00-1602

Supreme Court, U.S.
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In the Supreme Court of the United States

MACK E. SCOTT,

Petitioner,

v.

DORMAN STOUT, TONIA MARTIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal court violate the rulings of this Court and an African-American student's First Amendment rights when it concluded that a student's right to be free from state university officials' retaliation for his having exercised his First Amendment rights of speech and association was not a recognized constitutional right in 1996 which was protected through 42 U.S.C. §1983?

2. Does a federal court violate the rulings of this Court and an African-American university student's First Amendment rights when it concludes from the summary judgment record that the university's vice-president of Student Affairs and the Student Government Association (SGA) president had the "discretion" to disregard the election provisions of the SGA Constitution and Code of Laws by removing the student's name from the official SGA ballot while the student on a university-sponsored study tour in Africa and then had the discretion to disregard the write-in votes that the student actually received in the university's annual SGA election?

3. Does a federal court violate the rulings of this Court and an African-American student's First and Fourteenth Amendment rights when it concluded as a matter of law that the university officials did not have any unconstitutional motives when they removed the student's name from the official SGA ballot and when they then refused to count the write-in votes which the student actually received in the university's SGA Senate election?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Mack Scott is a private citizen and is resident of the state of Tennessee. Mr. Scott has no corporate affiliations.

Respondents

Dorman Stout is a private citizen and was Vice-President of Student Affairs at East Tennessee State University. Tonia Martin is a private citizen and was the duly elected president of the university's Student Government Association (SGA).

Other Parties

East Tennessee State University was a party defendant in the proceedings below but is not involved in the questions presented by this Petition.

Mack Scott respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 17

I. The Sixth Circuit Court Of Appeals Has Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court 17

II. The Question Presented Is Important 23

III. The Decision Of The Court Below Is Erroneous 23

CONCLUSION 24

APPENDIX

Appendix A
Court Of Appeals Opinion, 1/18/01 . . . . . 1a

Appendix B
District Court Memorandum, 6/25/98 . . . . . 15a

Appendix C
Affidavits of ETSU Students 43a

Appendix D
SGA Election Ballot (Fold-out) 53a

Appendix E
ETSU SGA Constitution 54a

Appendix F
ETSU Code of Laws 62a

Appendix G
Mack "Scottee" Scott's Petition to Enter
The Ballot for Student Senate (Fold-out) 74a

Appendix H
Plaintiff's Complaint, 8/16/98 . . . . . 75a

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. Creighton,
483 U.S. 635 (1987) 18

Anderson et al. v. Liberty Lobby Inc., et al.,
477 U.S. 242 (1986) 21

Buckley v. Valeo,
424 U.S. 1 (1976) 19

Healy v. James,
408 U.S. 169 (1972) 19

Law Students Research Council v. Wardmond,
401 U.S. 154 (1971) 19

Mt. Healthy City Schools Dis. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 20, 21, 22, 23

Papish v. Board of Curators of the University of Missouri,
410 U.S. 667 (1973) 19, 20

Perry v. Snidermann,
408 U.S. 593 (1972) 22

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 22, 23

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 22

Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503 (1969) 19, 20, 23

Constitutional Provisions

U.S. Const., amend. I . . . . . *passim*

U.S. Const., amend. XIV . . . . . i, 1, 2

Statutes

42 U.S.C. §1981 3

42 U.S.C. §1983 . . . . . i, 2, 3, 12, 17

42 U.S.C. §1985 3

OPINIONS BELOW

The opinion of the court of appeals on the merits, No. 98-6001 is unreported. It is reproduced in the App. A at pp. 1a - 14a. The opinion and order of the United States District Court for the Eastern District of Tennessee at Greeneville, No. 2-96-CV-412, is unreported and is reproduced in App. B. at 15a-42a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on January 18, 2001. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, among other things, that: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble . . . ." U.S. Const., amend. I.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part that:

> " . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of any citizens of the United States: . . . nor deny to any person within the jurisdiction the equal protection of the laws." U.S. Const., amend. XIV.

STATUTORY PROVISIONS INVOLVED

The provisions of 42 United States Code §1983 provide in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . 42 U.S.C. §1983.

STATEMENT OF THE CASE

Mr. Mack Scott's petition involves unconstitutional conduct of Machiavellian proportions by East Tennessee State University officials which deprived him of a seat in the university's Student Government Association (SGA). During 1995-1996, the individual defendants, University Vice-President of Student Affairs Dorman Stout and newly elected SGA President Tonia Martin, became vexed with the petitioner, the SGA's only African-American Senator at the time, because of his constant advocacy of minority causes, his continuing to prosecute a federal civil rights race discrimination case against the University, and his refusing to accede to their political demands. Because of the petitioner's popularity with the voting majority of the student body, the defendants were not able to legally deprive him of his SGA senate seat. Instead, they had to resort to unconstitutional retaliatory "backroom" maneuvering which violated Mr. Scott's First and Fourteenth Amendment rights. The

defendants were so incensed with Mr. Scott because of his First Amendment activities that they first removed the petitioner's name from the Student Government Association's 1996 ballot and then refused to count any of the write-in votes the petitioner actually received for a Senate seat in the 1996 SGA election.

The petitioner's original complaint included allegations of race discrimination against East Tennessee State University under Title VI of the Civil Rights Act of 1964 and allegations of race discrimination against defendants Stout and Martin under 42 U.S.C. §1981 and §1985 as well as the plaintiff's First Amendment claims for relief (App. H, pp. 75a-88a). In this petition, Mr. Scott is presenting only his First Amendment discrimination/retaliation claims against defendants Martin and Stout under the Fourteenth Amendment and 42 U.S.C. §1983.

Mack "Scottee" Scott, at the time was a 41-year-old African-American who was attending East Tennessee State University in 1995-1996 with the assistance of the federal G.I. Bill and annual Pell Grants. Prior to enrolling at the defendant University, the petitioner had served as a chief petty officer in the United States Navy for 20 years. As an E-7, Mr. Scott was in charge of the guided missile weapons system on the USS Wainwright and then headed-up various maintenance operations at the U.S. Naval Yard at Newport, Rhode Island. During the plaintiff's last tour of duty, he was the Ship's Superintendent at Shore Intermediate Maintenance Activity. As Superintendent, petitioner Scott had managerial authority over all of the maintenance facility shops which included three hundred (300) individuals and provided maintenance support for all visiting naval vessels and Coast Guard ships on the East Coast.

The petitioner was honorably discharged from the Navy in 1992. Since he had married a Kingsport native in 1980, Mr. Scott decided to return to the east Tennessee area and further his education at East Tennessee State University (ETSU). His positive experience in the Navy persuaded him that he should participate actively in student political affairs. Plaintiff Scott first attended college classes at the Kingsport University Center (KUC) branch of the University. Because the Kingsport campus did not offer all the courses he required to obtain a degree, the plaintiff eventually began taking additional classes at the University's main campus in Johnson City. It was during the petitioner's matriculation at the University's main campus while he held an SGA Senate seat that the defendants discriminated against him.

The District Court's Summary Judgment Memorandum Opinion, Curtis Collier, Judge, (Appendix B, pp. 15a-42a) dismissed the petitioner's race discrimination claims, did not address the petitioner's First Amendment discrimination/retaliation claims, categorized the defendants' election tampering as "discretionary acts," and concluded that the defendants had no unconstitutional motives behind their election tampering. Though the Student Government Associations' Constitution and Code of Laws, may not, in and of themselves, have created any constitutionally protected entitlements, the defendants' repeated violations of those written election protocols is clear evidence of the intensity of the defendants' retaliatory motivation behind their removing the petitioner from the 1996 official SGA ballot and then for not counting his write-in votes.

The summary judgment record shows that defendant Stout, as university Vice-president of Student Affairs and defendant Martin, as the SGA president, retaliated against Mr. Scott for his having filed a federal race discrimination

federal lawsuit the University and the Kingsport University Campus (KUC) Director Joe Tinnon, for his continued impassioned advocacy of black and other minority student organizations and causes, and for his repeatedly rejecting their demand that he vacate his 1995-96 SGA Senate seat to placate a white conservative Kingsport Center Student Advisory Council.[1]

The United States Court of Appeals for the Sixth Circuit adopted the summary judgment findings and conclusions of the District Court (App. A, pp. 1a- 2a). Only Judge Clay's dissenting opinion discussed the plaintiff's First Amendment claims and concluded that there were genuine material issues of fact remaining for trial as to whether the defendants retaliated against the plaintiff for his exercising his First Amendment rights which were clearly established at the time (App. A, pp. 5a-14a).

As the SGA Constitution (App. E pp. 54a-61a) and Code of Laws (App. F, pp. 62a-73a) provisions reflect, the SGA Secretary of the Interior was required count the ballots and the University's Vice-President of Student Affairs (defendant Stout) was required to observe the counting of the ballots and confirm the accuracy of the results. Instead, defendant SGA President Martin usurped authority, conducted the election, counted the ballots herself, and then ignored the votes received by the petitioner. Defendant Stout collaborated with defendant Martin, assisted and facilitated the removal the petitioner's name from the official SGA ballot, refused the petitioner's demand to reinstate his name on the ballot,

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[1] Defendant Martin and other cabinet rank SGA officers were paid a stipend by the university based on the number of hours designated for each SGA position by the university.

suggested Mr. Scott run as a write-in candidate, and then participated in the scheme to discard the petitioner's write-in votes. Had the votes cast by the four affiants been counted, Mr. Scott would have won reelection to an available SGA Senate seat.

The District Court's summary judgment memorandum and the two paragraph affirmation opinion by the Court of Appeals are remarkable for their complete lack of discussion of the petitioner's First Amendment claims. The record shows that Stout and Martin's election tampering did not occur in a vacuum. The initial event which transformed the petitioner's status from that of the SGA's popular black senator to that of "a thorn in the side" of the defendants was the storm of protest which arose from the conservative and all-white Kingsport University Center's Student Advisory Council after the petitioner filed his 1995 federal race discrimination lawsuit against the University and the KUC director Joseph Tinnon. The petitioner brought his first suit because of racially-motivated discrimination which had resulted in his being denied election to the office of President of the KUC's SAC. Fortunately, the petitioner faired better in campus-wide politics in 1995 and was elected to the SGA Senate by the student body as a whole.

After he sued the University and the KUC director in the spring of 1995, the plaintiff was advised by the defendants that the all-white SAC had determined that they wanted their hand-picked white SGA candidate, Chad Nixon, who had just lost the Senate election to the petitioner, to be given the petitioner's SGA Senate seat.[2] Shortly after the filing of the

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[2] Although the SGA Constitution required that each Senator represent the entire student body and mandated an at large election

petitioner's 1995 race discrimination suit had been publicized, defendants Stout and Martin telephoned Mr. Scott at his home and relayed the threats made by the white KUC's SAC members to the effect they would challenge the plaintiff's continuing to hold his recently-won SGA seat. When the defendants saw that the petitioner was unmoved by such threats, the defendants deliberately misrepresented the eligibility requirements of the SGA Constitution to Mr. Scott by reading from a 1989 version of the SGA Constitution. Having already familiarized himself with the terms of the current SGA Constitution and Code of Laws and its election protocols, the petitioner became offended at the defendants' bad faith representations to force him to relinquish his Senate seat and rebuffed them.[3]

Intent upon appeasing the all-white SAC which had supported her presidential election bid, defendant Martin, with defendant Stout's cooperation and approval, prepared a written SGA resolution which would have prevented the petitioner from running for reelection to his SGA senate seat in 1996. Having been forewarned of the defendants' retaliatory conspiracy, the petitioner and his political friends in the SGA prevented consideration of the defendants' resolution by blocking the confirmation of Martin's new cabinet and Student Court appointments at the 1995 spring post-election SGA meeting. Once the 1995 fall semester

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without regard to the candidates' college, the defendants, as a result of KUC pressure, continued to insist upon segregating SGA Senate seats by colleges and campus location.

[3] Mr. Scott did not bear any personal ill-will towards the KUC student whom he had defeated in the SGA election and supported Chad Nixon's appointment to an available at-large Senate seat when the 1995 Fall semester began.

began and SGA activities officially resumed, the defendants' retaliatory animosity and resentment toward the plaintiff increased.

The conservative white members of SAC at the University's Kingsport campus continued to object to the plaintiff's holding "their" SGA senate seat as he prosecuted his race discrimination lawsuit, espoused black and minority causes, and operated as a "campus liberal" in their eyes. The SAC's displeasure was so intense that defendant Stout had to make a special trip to the Kingsport campus in the Fall of 1995 to explain to the SAC that the student body would have to amend the SGA Constitution in order to give the KUC its own Senate seat and that nothing could be done to legally remove the plaintiff from the SGA seat he was currently holding. Angry that the petitioner had rebuffed her demands that he relinquish his Senate seat, had quashed her punitive resolution, and had then delayed her administration appointments, defendant Martin's personal animosity toward the petitioner exhibited itself in petty acts of discrimination and retaliation. Among these were her refusing the petitioner's request that she refer to him by his well-known nickname of "Scottie" Scott on the university's Homecoming King ballot, her openly snubbing the petitioner in University social settings, and her repeatedly refusing to recognize the plaintiff's right to speak on the SGA Senate floor when he raised his hand for recognition. The petitioner's vocal objections to defendant Martin's pattern of retaliation appears to have further aggravated the defendants. Defendant Martin convened a monthly meeting of the SGA Senate at the Kingsport University Center campus and allowed irritated white SAC members to publically berate the petitioner.

Mr. Scott's advocacy of minority causes, his insistence that minority groups' requests for University-sponsored 606

funding be granted on a par equal with the funding afforded white student organizations, his successfully organizing the campus chapter of the NAACP, and his categorizing the defendants' official actions as "racist" when he believed that description applied, all focused student newspaper attention upon the petitioner and exacerbated the anti-Scott sentiment held by the all-white Kingsport campus SAC and defendants Stout and Martin.

In spite of the defendants' objections to the plaintiff's holding his SGA Senate seat, none of the amendments to the SGA Constitution which were collated and published during defendant Martin's 1995-96 term as SGA president required an SGA senatorial candidates to be enrolled in a specific college or at a particular campus in order to campaign for or to be elected to the SGA senate during each year's annual at-large SGA election.

When the petitioner presented his 1996 senate nominating petition (App. G. p. 74a) to SGA officials on March 6, 1996, it was initially approved and signed by defendant Martin on its "Signature of Certifying Official" line. However, after Mr. Scott had left the country the next day for a University-sponsored student study seminar in Africa, the defendants saw their opportunity tamper with the election process and conspired to effect the rejection of the plaintiff's petition and to remove his name from the official SGA ballot. Although neither Stout nor Martin was authorized or permitted by the SGA Constitution and Code of Laws to interfere in the nominating process, they did. The defendants contrived to appoint an *ad hoc* committee which was composed of her political friends and allies. Defendant Martin met with her committee of friends in defendant Stout's University Student Affairs Office. Without resorting to the provisions the SGA Constitution and Code of Laws for

guidance, Matin's friends recommended that the plaintiff's nominating petition be rejected and that his name be "withdrawn" from the ballot. When the plaintiff returned from Africa and learned of the defendants' illegal maneuvers, he telephoned defendant Stout and demanded that his name be restored to the official ballot. Defendant Stout refused, claiming the ballot had gone to the printers.

Knowing that write-in candidates were at a distinct disadvantage,[4] Martin and Stout suggested to the petitioner that he run as an "official write-in" candidate. Instead, Mr. Scott requested that his friends write him in on the ballot at the various polling booths as an "unofficial" write-in candidate. In an effort to outmaneuver the defendant Martin, the petitioner spread the word among Martin's political allies that he was mounting a write-in campaign in the College of Nursing. As the plaintiff anticipated, three write-in candidates for the College of Nursing suddenly appeared on election day and won the three vacant SGA Senate seats designated by the defendants for that college. In the meantime, Mr. Scott wrote his own name in under the ballot's Senator-at-Large designation. At least four (4) of the petitioner's student friends wrote in the plaintiff's name under the College of Applied Science and Technology - the College which the defendants had been insisting that the plaintiff had to list on his nominating petition in order to be a viable candidate. Those four student friends filed affidavits as part of the summary judgment record which reflect that they did indeed vote for the petitioner and voted for him in the designation demanded by the defendants - as SGA Senator from the College of Science and Technology (App. C, pp. 43a-52a).

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[4] Chad Nixon, the KUC candidate whom the petitioner had defeated in 1995, had been a write-in candidate.

But those four votes, as well as any of the others the plaintiff may have received, never saw the light of day. Again usurping SGA authority vested by the Constitution in other SGA officers, defendant Martin personally counted and tallied the ballots but withheld the final certification and publication of the vote count until after the petitioner had appealed the election to the University's Student Court and had lost.

Having deprived the plaintiff of a place on the official SGA ballot and having trashed all of his write-in votes, the defendants saw to it that the plaintiff's election complaint to the Student Court was an exercise in futility. For the third time, defendant Martin usurped authority vested in another SGA officer and personally represented the SGA in the Student Court proceedings. Instead of advising the Student Court that the petitioner had received write-in votes under the College of Applied Science and Technology and "elsewhere," defendant Martin, with the assistance and concurrence of defendant Stout, presented testimony from some of the strident Kingsport University Center SAC members who had been complaining about the petitioner's having been "their" SGA senator for over a year.

Though defendant Stout had explained during the 1995 Fall semester to the Kingsport SAC that the KUC had no entitlement to its own Senate seat under the SGA Constitution and that the plaintiff was holding his Senate seat legally, neither Martin nor Stout repeated this admonition to the Student Court on Mr. Scott's behalf. Neither the Student Court nor defendants Martin or Stout mentioned the fact that one of the Student Court justices who heard the petitioner's election appeal had participated in Martin's *ad hoc* committee meeting and had recommended that Mr. Scott's name be removed from the official ballot. Understandably but

regrettably, defendants Martin and Stout concealed evidence of their repeated violations of the SGA Constitution and Code of Laws and from the Student Court.

Even though it recommended that the SGA amend its Constitution and Code of Law to sanction the course of conduct which defendants Martin and Stout had pursued against the plaintiff, the Student Court denied the petitioner's appeal and urged him to ask for an "available" at-large Senate seat in the Fall. As allowed by the SGA Constitution, plaintiff Scott appealed to University President Roy Nicks. Without elaboration, University President Roy Nicks confirmed the decision of the Student Court.

By retaliating against the petitioner for engaging in campus political activities and speech with which they disagreed, the defendants violated the First Amendment. Furthermore, defendants Stout and Martin offered no rational basis in the summary judgment record for their interfering with the petitioner's fundamental constitutional rights. The defendants' repeated violations of the university's approved and published SGA election protocols is ample circumstantial evidence their unconstitutional motivation.

Vote counting, by its very nature, is mandatory and ministerial and the SGA Constitution recognized it as such. Neither the District Court nor the Court of Appeals cited any decisional authority for the remarkable conclusion that the defendants' removing the plaintiff's name from the SGA ballot and then disregarding the write-in votes which the plaintiff did receive were "discretionary" acts which absolved them of liability for constitutional violations under 42 U.S.C. §1983. The terms of the SGA Constitution (App. E, pp. 54a-61a) and Code of Laws (App. F, pp. 62a-73a) did not vest either defendant with any authority or discretion to intervene

in the SGA election process and block the plaintiff's nomination or election.

The District Court concluded that defendant's departure from their "dictates" of the SGA Constitution and Code of Laws did not rise to the level of a constitutional violation. The District Court also ruled that the defendants' removing the plaintiff's name from the official ballot and their not counting his write-in votes were"discretionary" activities, that Mr. Scott had not shown that either defendant violated any "clearly established" constitutional right, and that he also failed to prove that the defendants were not entitled to "qualified immunity" (App. B, pp. 41a-42a) The Court of Appeals adopted the District Court's erroneous opinion without elaboration.

The petitioner acknowledges that the written SGA election protocols do not create any constitutional rights. But the defendants' flagrant violation of the election provisions of the SGA Constitution and Code of Laws is important circumstantial evidence of the intensity of the retaliatory motivation behind the defendants' election tampering. Article III, "Legislative Branch" of the SGA Constitution, which was compiled and published during defendant Martin's term of office, defined the qualifications and duties of SGA Senators and mandate that the candidates' names appear in random order on the official ballot. Article III, A-2, of the Constitution (App. E, p. 56a) required that the Student Senate be elected at a general election and did not mandate that the student candidate had to run for a seat from the college in which the student was enrolled. Article III, B-3 required that each Senator represent, to the best of his/her ability, entire the student body of ETSU by voicing the concerns of the student body as they arose. When the SGA Senators voted on 606 funding applications by student groups, they were told by the

language of § B-4 to keep in mind the "welfare of the entire student body" (App. E., p. 56a).

One of the chief SGA political disputes between the petitioner and the defendants was addressed at Article III, § B-4:

> Section 4. Appointment of Senate Seats. Thirty-two seats shall be apportioned to the Student Senate in each general election, and this shall be the maximum size of the Senate. All of these seats shall be elected by the student body at-large. **The order of the names on the ballot shall appear on the general election ballot in random order to be determined by the Secretary of Interior, while supervised by one representative from the three branches of Student Government.** (App. E, p. 57a; emphasis supplied.)

The insistence of the defendants and their friends at the Kingsport Campus SAC that the Mr. Scott was holding the KUC's Senate seat and should "move over" for the KUC's hand-picked conservative white candidate was not supported by any provisions of the SGA Constitution and was simply the overt manifestation of discriminatory/retaliatory animus. The pertinent Constitutional language also makes it clear that Mr. Scott did not have to run as a senator from the College of Applied Science and Technology in the 1996 SGA elections in order to be listed on the SGA official ballot.

The SGA's Code of Laws functioned as the equivalent of the SGA's bylaws and amplified several of the constitutional provisions. Title IV, "Campus Elections"

(App. F, p. 63a) specified the information which had to be provided by the SGA Senate candidate on his "Petition to Enter the Ballot." That information is the student's name, ID number, campus box number, telephone number, hours of course credits earned, dates of attendance at ETSU, the candidate's grade point average, and the candidate's signature. The petition had to bear the signatures and identification numbers of 75 students and had to be certified by the Vice President for Student Affairs (defendant Stout) or his designated representative. There is no provision which required that any senatorial candidate identify the college or campus in which he was enrolled.

Subsection E of Title IV of the Code of Laws (App. F, p. 63a) authorized the Secretary of Interior, not SGA President Martin, to consult with the Vice-President for Student Affairs (defendant Stout) for the purpose of verifying any information listed on any Petition to Enter the Ballot.

Section 2, Article I, of Title IV of the Code of Laws was known as the Write-In Candidacy Act (App. F, p. 65a). Even if a write-in candidate's name did not appear on the official write-in ballot, he/she was given the right to have his/her names written onto the election ballot at the polls by those students wishing to vote for him/her as a write-in candidate. Article 2 of Title IV of the Code of Laws echoed the constitutional requirement that the names of the candidates for the SGA offices appear in a "random order" to be determined by the Secretary of Interior, and not, as the defendants insisted, listed under various colleges or campuses (App. F, p. 68a).

Section 3, Article 2, of Title IV of the Code of Laws was known as the Election Tally and Certification Act (App. F, p. 69a). Significantly the by-law required at ¶A that ". .

. the ballots shall be counted." Nowhere in the Election Tally and Certification Act was the SGA President Martin or Vice-president of Student Affairs Stout given any authority, or discretion, to remove a candidate's name form the SGA ballot, or to ignore any votes which had been cast for a particular candidate.

The provisions of Title IV, Article 2, Section 4 of the Code of Laws is known as the Elections Commission Act (App. F; p. 71a). It was ths section that defendants Martin and Stout violated when they convened the ad hoc petition review committee in defendant Stout's university office to provide a pretext to reject Mr. Scott's nominating petition. The white candidates' nominating petitions which defendant Martin presented for her committee's review to avoid charges that she was "singling out" the petitioner were ultimately approved.[5] Defendants *ad hoc* committee had no authority to listen to defendant Martin or make any recommendations regarding the validity of any nominating petitions. The standing committee authorized by the Code of Laws was to be a permanent committee chaired by the Secretary of Interior. The authorized standing committee was required to meet not less than once a month and is empowered only to discuss the SGA general elections and any problems arising from election administration (App. F, p. 72a). Instead of political friends and allies of the current SGA President, the committee was required to be composed of the Secretary of Interior, the

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[5] Defendant Martin never let her commission friends see the nominating petitions or the Constitution or Code of Laws. She just described the individual candidate's circumstances as she viewed them to her committee. Martin did not advise her friends that he had initially signed her approval to Mr. Scott's nominating petition.

Secretary/Treasurer of the SGA, the Secretary of Public Relations, two SGA senators not seeking reelection, and two other students selected by the Secretary of the Interior.

There is absolutely nothing in the SGA Constitution or Code of Laws to support the District Court and Court of Appeals' conclusions that the defendants' removing the petitioner's name from the official SGA ballot was a valid "discretionary" act or it was within the defendants' discretion to ignore the write-in votes the petitioner received in the 1996 SGA election. Under the provisions of 42 U.S.C. §1983, the individual defendants Stout and Martin are "persons" who are liable under for their discriminatory and retaliatory violations of the plaintiff's First Amendment rights.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Court of Appeals Has Decided an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court.

The District Court and Court of Appeals missed the point of the case when they ignored the petitioner's First Amendment claims, when they concluded that the SGA election tampering activities of defendants Martin and Stout were "discretionary," that the petitioner's constitutional rights were not firmly established in 1996, and that in any event the defendants were entitled to "qualified immunity" from §1983 liability.

In the first place, the defendants were not given any "discretion" to exercise during the nominating process or vote-counting process by the SGA Constitution and Code of Law. The petitioner has addressed the complete lack of

discretion afforded either defendant during the SGA elections process in his Statement of the Case. The SGA Constitution mandated that all votes be counted.

There may not be any other reported federal civil rights cases in which white University officials retaliated against an African-American student who had sued the University, who had dared to oppose them in campus politics, and who had espoused minority causes by the official's removing the student's from an official SGA ballot and by their deliberately disregarding valid write-in votes the student did receive. But the case-specific retaliatory activities under scrutiny in Mr. Scott's case need not have been judicially addressed in prior cases for them to be objectively unconstitutional. It is only necessary that the illegality of the defendants' conduct be apparent in light of pre-existing law. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

The District Court and Court of Appeals failed to recognize that the question should have been whether the applicable First Amendment constitutional law was developed to the extent that University and SGA officers, such as defendants Stout and Martin, could have been expected to know they could not legally retaliate against Mr. Scott because he disagreed with them politically or because they and their political friends objected to Mr. Scott's speech, his campus associations, his filing a federal lawsuit against the university, his campus politics, and his advocacy of minority viewpoints and causes. Even if there had not been any SGA Constitution or Code of Laws which guaranteed the Mr. Scott the right to participate in the student government if he complied with the regulation's prerequisites, Mr. Scott insists that the law has been clear for decades that state actors (Stout and Martin) could not deprive him of the opportunity to participate in public university student government activities

and elections because they personally disapproved of his speech and associations.

U.S. Supreme Court cases from 1969 forward have held that a public school student cannot be punished for the content of his speech as long as that speech or conduct does not disrupt the classroom or materially interfere with school activities. *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 514 (1969); *Healy v. James*, 408 U.S. 169 (1972); and *Papish v. Board of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973). The plaintiff's First Amendment activities which incurred the retaliatory animus of the defendants took place in the student government arena with its emphasis on free and informed debate, mature disagreement, political maneuvering, and the espousal of competing social and political issues.

This Supreme Court has held that state-imposed infringements of First Amendment rights must be closely drawn to avoid unnecessary abridgement of associational freedoms. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The rationale of *Law Students Research Council v. Wadmond*, 401 U.S. 154, 162-63 (1971) requires that the state actors must assume the "heavy burden" of demonstrating the justification for their First Amendment abridgments. In petitioner Scott's case, the defendants have not offered any justification for retaliating against the plaintiff for his speech, his political positions, and his association with, and his advocacy for, minority groups and causes. The defendants simply claimed that they had the "discretion" to violate the University's SGA rules and regulations in order to tamper with the election process, to remove the plaintiff's name from the official ballot, and to disregard the write-in votes the plaintiff actually received. The District Court and Court of Appeals mistakenly agreed with the defendants.

The dearth of published cases which involve the "fixing" of a University-sponsored SGA election to punish a minority student for his political speech and activities, and for his having filed a federal discrimination lawsuit against the University simply confirms that the well-recognized constitutional principles of *Tinker, supra* and *Papish, supra,* have enjoyed widespread compliance by officials at public colleges and universities.

This Court's decision in *Mt. Healthy City School Dis. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977) sets out the analytical standard federal courts are required to utilize when determining when a public employee has been subjected to unconstitutional retaliation by a public employer. The petitioner insists that the same constitutional analysis should have been applied to his situation by the Court of Appeals. The threshold question of whether the plaintiff's speech, association, and/or conduct deserve First Amendment protection must be determined by the District Court. Then, if the District Court determines the plaintiff's speech and conduct was protected, and the evidence tends to show that the petitioner's protected conduct may have been a motivating factor behind the defendants' adverse actions, the defendants must produce evidence that they would have pursued the same adverse course action for legally valid reasons and without regard to their vexation over the plaintiff's protected activities. A jury then has to weigh the evidence to determine if unconstitutional retaliatory animus actually motivated the defendants.

The Court of Appeals and District Court should have allowed the jury to have drawn the inference that since defendant Stout had gone on record confirming to the Kingsport campus SAC that Mr. Scott's interpretation of the SGA Constitution was accurate, only university and SGA

officials who were motivated by illegal animus would feel compelled to repeatedly violate the nominating and election mandates of the SGA Constitution and Code of Laws in order to remove the petitioner from the SGA Senate.

The District Court and Court of Appeals ignored this Court's *Mt. Healthy* analytical standards. Though the District Court concluded that most of the plaintiff's complaints regarding the defendants' conduct did not support his claim for race discrimination, it did not analyze those complaints in the context of the plaintiff's First Amendment claims. The District Court and Court of Appeals did not address the threshold issues regarding the protected nature of the petitioner's speech and conduct which so vexed the defendants and which motivated their taking adverse action against him during the 1996 SGA election. Instead, the lower courts assumed the obligation assigned by this Court to the jury and then determined, without benefit of a trial or cross-examination of witnesses, that the defendants' election tampering was not motivated any unconstitutional retaliatory animus. Finally, the lower courts concluded that even if any of the plaintiff's constitutional rights had been violated, the defendants were entitled to "qualified immunity."

A finding of that the defendants were motivated by illegal retaliatory animus in spite of their protestations of good faith has to involve a resolution of contested issues of material fact and/or the reasonable inferences to be drawn from uncontested facts. In either case, those decisions have to be made by the jury - not by the District Court during summary judgment proceedings. The legality or illegality of defendants' motives should have been an issue for trial. *Anderson et al. v. Liberty Lobby Inc., et al.*, 477 U.S. 242, 249 (1986).

When the disputed issue is what motivated the defendants to take adverse actions against the petitioner, and there is proof that the petitioner's protected activities could have been a motivating factor behind the defendants' adverse actions, summary judgment is not appropriate. This Court has specifically recognized in *Pullman-Standard v. Swint,* 456 U.S. 273, 287-289 (1982) that whether a defendant's conduct reflects an intent to illegally discriminate and/or retaliate is a "pure question of fact" for the trier of fact to determine. Discriminatory or retaliatory intent is not a question of law which can be decided at the summary judgment stage.

The District Court's summary judgment and the Court of Appeals' approval thereof disregard both this Court's *Mt. Healthy* analytical standards for resolving First Amendment free speech and association retaliation claims and this Court's mandate in *Pullman-Standard v. Swint, supra,* that the fact-finder must decide whether a defendant's motives were discriminatory.

Though the petitioner's complaint and prior summary judgment and appellate briefs have also addressed equal protection issues and property right issues, the viability of the petitioner's First Amendment retaliation claim does not depend upon the existence of a recognized property interest or liberty interest in his being an SGA senatorial candidate or in having his write-in votes counted. A university's Vice-President of Student Affairs, and its SGA President may not deny the petitioner the right to participate as a candidate in an SGA election when that denial infringes upon the petitioner's protected freedom of speech and association. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) and *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990).

II. The Question Presented Is Important

The need to have all federal courts apply the uniform analytical and evidentiary standards set by this Court when reviewing First Amendment retaliation claims is self evident under our jurisprudence of *stare decisis*. A haphazard approach which does not reflect this Court's established constitutional precedent trivializes First Amendment rights and affords protection only to those individuals who are fortunate enough to gain access to federal courts in venues where this Court's holdings *in Tinker, supra, Pullman-Standard, supra,* and *Mt. Healthy, supra,* are recognized and properly applied. The Court of Appeals decision sanctions public university officials' punishing a student for "unpopular" speech and political activities which are protected by the First Amendment.

III. The Decision of the Court of Appeals Is Erroneous

The Court of Appeals ignored this Court's ruling in *Tinker v. Des Moines Index. Community Sch. Dist.*, 393 U.S. 503 (1969) when it refused to recognize that the petitioner's right to be free from retaliation for his SGA political speech and conduct was a recognized constitutional right in 1996 for purposes of bringing it within the protective ambit of 42 U.S.C. §1983. The Court of Appeals decision also violated the ruling of this Court in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) as well the constitutional analytical standards developed by this Court in *Mt. Healthy City School Dis. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) by allowing a summary judgment proceeding to be substituted for a jury trial on issues which this Court has held are issues of fact which must be submitted to a jury.

By adopting the erroneous memorandum opinion of the District Court as its own, the Court of Appeals confirmed the lower court's analytical errors and disregarded this Court's established First Amendment precedent. The Court of Appeals and District Court did not address the petitioner's First Amendment claims, reached the wrong decision, and thereby sanctioned future retaliation by public university officers against vocal students who oppose their campus political agendas.

Certiorari jurisdiction is warranted to correct this error and to clarify the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed January 18, 2001]

No. 98-6001

MACK E. SCOTT,
Plaintiff-Appellant,

v.

DORMAN STOUT, TONIA MARTIN, EAST TENNESSEE STATE UNIVERSITY,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BEFORE: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

PER CURIAM. Plaintiff-Appellant Mack E. Scott has challenged summary judgment entered in the United States District Court for the Eastern District of Tennessee in favor of Defendant-Appellees the East Tennessee State University

("ETSU"), its Vice-President of Student Affairs, Dorman Stout, and former ETSU Student Body President Tonia Martin in his civil rights action commenced pursuant to 42 U.S.C. §§ 1981, 1985(3), and 2000d.

Upon consideration of the record in its entirety, the briefs of the parties, and the arguments of counsel, this court concludes that the trial court's findings of fact and conclusions of law are correct and in accordance with law.

Accordingly, it is ORDERED that the judgment of the District Court is AFFIRMED for the reasons expressed in Judge Curtis L. Collier's opinion.

BOGGS, Circuit Judge, concurring separately. While I concur in the result reached by Judge Krupansky, I write separately to add a few more details. Plaintiff in this case is a disappointed office seeker in the Student Government at a State University. The case comes to our attention primarily on a claim that he was not just treated unfairly in the crucible of student politics, but that he was treated unfairly because of his race.

Initially, he focused primarily on the fact that he was not allowed to run for the post of Student Senator for a college unit that he did not attend, Kingsport University Center. This is the primary ground raised in his complaint (JA 12), and it is also the basis on which he contested his non-election through the university court system. (See JA 34). The district court correctly held that there was no evidence to support a claim of racial discrimination in the application of this rule.

Later, however, plaintiff began to advance the claim that he had received a number of write-in votes that should have been counted, that those votes were not counted, and that the failure to count those votes was on account of racial bias. I believe that Judge Collier correctly held that there was no evidence of racial bias in the counting of votes, even if there were allegations that some votes properly cast for the plaintiff were not counted.

It is important to note that the accuracy of the vote count was not put in issue in a prompt fashion. The election was in April 1996. Scott filed his complaint in August 1996. By April 1997, a scheduling order directed all discovery to be completed by February 1998, with all plaintiff's Rule 26 disclosures to be made by May 15, 1998, and a trial date set of July 28, 1998.

The defendants moved for Summary Judgment on April 21, 1998. It was only on May 14 and 15, 1998, presumably in connection with the opposition to summary judgment that Scott would file on May 21, that four students gave affidavits stating that they had written in Scott's name for Senator in the College of Applied Sciences & Technology (CAST), the unit Scott did attend. In his own deposition, Scott asserted that he had written in his own name for Senator, but had not done so in any particular constituency. It is thus not surprising that this alleged vote was not recorded in the tally sheet of the Elections Committee. Scott had not previously claimed that he had sought or received any votes for the CAST post, even though he had been encouraged to run as a write-in candidate for that exact position (JA 60, 91). In fact, as the district judge noted, (JA 31), Scott's deposition denied that he had sought or received write-in votes except in

Nursing, though his affidavit, filed later, contradicts this. As we have held in *Reid v. Sears, Roebuck,* 790 F.2d 453, 460 (6th Cir. 1986), a later-filed affidavit cannot be used to create a genuine issue of material fact in contradiction to a witness's deposition.

Even if we take the student affidavits at face value, there is nothing in them, or in any of the other materials in the record, to link any such failure to count votes with any alleged racial bias against Scott. Indeed, one of the affidavits, from Kim Williams (JA 217) states that she also voted for Mark Beatty, not alleged to be a minority person, for the same position, and his name also does not appear on the tally sheets.

Unlike the dissent, I would hold that no adverse inference can be drawn from the failure of the student government or the university to produce the ballots, when this issue was first made salient only two years after the election, and no specific request for the ballots had been made. In addition, Tonia Martin, the President of the Student Government, stated in her own deposition that she recalled some write-ins for Scott (out of over 1000 ballots cast), but that she had no recollection of why they might not have been reflected on the tally sheets.

Under these circumstances, I think Judge Collier did not err in holding that there was insufficient evidence to convince a reasonable jury that there was racial bias involved in this student election dispute. Many election losers have some quarrel with the vote-counting procedures, but unless there is more than speculation as to the method and reasons behind their loss, summary judgment must be sustained.

CLAY, Circuit Judge, dissenting. Because I believe that questions of fact remain for trial regarding Plaintiff Mack E. Scott's claim of race discrimination under Title VI, as well as his claims brought under 42 U.S.C. § 1981, 42 U.S.C. §1983, and 42 U.S.C. § 1985(3), I respectfully dissent. Today's majority holding affirming United States District Court Judge Curtis Collier's decision to dismiss this case at the summary judgment stage ignores genuine issues of material fact as raised and supported by the evidence -- evidence which must be viewed in the light most favorable to Plaintiff -- in complete contravention of the standards set forth when adjudicating a Rule 56 motion. In other words, "the evidence [submitted by Plaintiff] presents sufficient disagreement to require submission to a jury" inasmuch as the evidence is not "so one-sided that [Defendants] must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Notably, the majority concludes that the district court's "findings of fact and conclusions of law are correct and in accordance with the law." However, when adjudicating a motion for summary judgment, it is inappropriate for a district court to make "findings of fact." Rather, the facts and any reasonable inferences drawn therefrom are to be viewed in the light most favorable to the nonmoving party to determine whether a genuine issue as to any material fact remains for trial. *See* Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A genuine issue or dispute of fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *See Anderson,* 477 U.S. at 247-49. Such is the case here.

A. Plaintiff's Title VI Claims

I disagree with the majority that the district court properly granted summary judgment to East Tennessee State University ("ETSU") on Plaintiff's claim for race discrimination under Title VI, 42 U.S.C. § 2000d, where Plaintiff came forward with sufficient evidence to demonstrate that a genuine issue of fact remains for trial as to whether the failure to count the votes that Plaintiff received for the position of senator representing the College of Applied Science and Technology was done intentionally because Plaintiff is African American. Although Defendants offered a colorably legitimate reason to rebut Plaintiff's contention that his name was intentionally omitted from the ballot for the position of senator from the Kingsport University Center ("KUC") campus, Defendants failed to come forward with a legitimate reason as to why the write-in votes which Plaintiff allegedly received for the position of senator from the College of Applied Science and Technology were not counted.

Indeed, Defendants' contention that the votes were not counted because Plaintiff's name was not written on the voting ballot in the proper fashion by voters is based upon pure speculation. For example, ETSU failed to come forward with the ballots in question indicating that they were filled out incorrectly; failed to come forward with affidavits from "vote counters" to indicate that the votes were not counted because the ballots were filled out incorrectly; and failed to come forward with any written policy indicating that write-in votes must be indicated in a certain fashion on the ballot or the votes will not be counted in the final tally.

On the other hand, Plaintiff came forward with affidavits from students stating that they in fact wrote in Plaintiff's name to serve as a senator from the College of Applied Science and Technology on their voting ballots. Specifically, Plaintiff came forward with affidavits from four students -- Derek Blix, Kim Williams, Chadwick Lincoln Lamar Brown, and Bonnie Silvers -- each indicating that they wrote Plaintiff's name in under the College of Applied Science and Technology on their voting ballots with the intention that their vote would be counted for Plaintiff to serve as a senator from that college. In fact, one of the affiants, Bonnie Silver, stated that she had written in other candidates for senator positions in past elections, that she wrote-in Plaintiff's name for the open seat available under the College of Applied Science category, and that there was no announced requirement that a candidate had to be written in in a certain fashion.

Plaintiff also came forward with his own affidavit claiming that he was being discriminated against for, among other things, voicing his opinion regarding what appeared to be racist activities by certain members of the Student Government Association ("SGA") and successfully organizing a student chapter of the NAACP at ETSU's Johnson City campus, along with his testimony that he wrote himself in to serve as senator on his own voting ballot. This evidence, coupled with the fact that Plaintiff was the only African-American candidate running for a senate position at ETSU, and the apparent fashion in which Defendants railroaded Plaintiff's name from appearing on the ballot in the first place -- i.e., holding an election committee meeting while Plaintiff was in Africa on an ETSU sponsored seminar and then submitting the voting ballot to the printer before Plaintiff

returned so as to prevent Plaintiff from placing his name as a candidate from the College of Applied Science and Technology -- creates a genuine issue as to whether the write-in votes that Plaintiff allegedly received for the position of senator from the College of Applied Science and Technology were intentionally not counted because of Plaintiff's race. This is particularly so where although three open senate seats were available for the College of Applied Science and Technology, only two senators were elected: one by having his name set forth on the preprinted ballot (James Barker), and the other by having succeeded as a write-in candidate (Brad Singletary). Accordingly, it appears as though if even one of the write-in votes which Plaintiff allegedly received for the position of senator from the College of Applied Science and Technology had been counted, Plaintiff would have won the open senatorial seat.

Therefore, I would reverse the district court's grant of summary judgment to ETSU on this issue. Unlike the case of *Buchanan v. City of Bolivar, Tennessee*, the case relied upon by the district court in rendering it's decision, where the plaintiff "merely asserted, without any supporting documentation or evidence, that her son 'would not have been arrested had he been a caucasian student,'" 99 F.3d 1352, 1357 (6th Cir. 1996). Plaintiff in the instant case came forward with affidavits from students who indicated that they in fact voted for Plaintiff to serve as a senator from the College of Applied Science and Technology, and Defendants have failed to rebut this evidence to support a legitimate reason for their failure to count the votes.

B. Plaintiff's § 1981, § 1983, and § 1985(3) Claims

I agree with the district court that ETSU, as an arm of the state of Tennessee, is immune from suit under 42 U.S.C. § 1981, § 1983, and § 1985(3). *See Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974). However, I disagree with the district court's conclusion that assuming Plaintiff could prove a violation by Martin and/or Stout under any of these provisions, Plaintiff has failed to prove that Martin and Stout are not entitled to qualified immunity inasmuch as Plaintiff has failed to produce any evidence that these individuals violated a right so clearly established at the time that any official in these positions would have clearly understood that they were under an affirmative duty to refrain from such conduct. Plaintiff alleged that Martin and Stout violated his right to free speech and association under the First Amendment; his right to equal protection under the law for exercising his First Amendment freedoms and to be treated as other persons similarly situated under the Fourteenth Amendment; and his right to due process to protect one's property interests under the Fourteenth Amendment.

As a rule, "'governmental officials performing discretionary tasks generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Meyers v. City of Cincinnati,* 979 F.2d 1154, 1156 (6th Cir. 1992) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). At the summary judgment stage of the proceedings, if there is a factual dispute as to an issue on which the question of qualified immunity turns, or if the undisputed facts show that the defendant's conduct violated clearly established rights,

then the motion should be denied. *Cameron,* 38 F.3d 264, 273 n.2 (6th Cir. 1994). Here, because questions of fact remain for trial regarding Plaintiff's free speech claim under the First Amendment as well to his equal protection claim under the Fourteenth Amendment. Martin and Stout were not entitled to summary judgment on the basis of qualified immunity. *See* 38 F.3d at 273 n.2.

Regarding the First Amendment claim, Plaintiff contends that when Stout and Martin intentionally eliminated his name from the ballot and refused to count his write-in votes, they were retaliating against him for "fil[ing] a race discrimination lawsuit against the University, . . . opposing them politically during the 1995-96 school year, . . . publicly advocat[ing] the causes of black and other minority student groups in the face of majority opposition in the SGA, . . . [and] refusing to accede to the racially motivated demands of a white, conservative Kingsport University Center Student Advisory Council that he relinquish his particular SGA Senate seat." *See* Plaintiff's Brief on Appeal, at 34. Plaintiff analogizes to the directive provided by this Court in *Ratliff v. Wellington Exempted Village Schools Board of Education,* 820 F.2d 792, 795 (6th Cir. 1987) for analyzing an employee's claim that an employer took adverse action against him in retaliation for his exercise of First Amendment rights. The analytical framework provided by the *Ratliff* Court is as follows:

> (1) The threshold question is whether the plaintiff's conduct deserves constitutional protection.

> (2) If the court finds that an employee's conduct was protected by the first amendment, the finder of fact must determine whether the action taken was because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or "motivating factor" in the employer's decision.
>
> (3) Once the employee meets this burden, the burden shifts to the employer to prove that the action the employee is complaining about would have taken place absent the protected conduct.

820 F.2d at 795.

Under *Tinker v. Des Moines Indep. Community School District,* it is well-established that a university student cannot be punished for the content of his speech as long as that speech or conduct does not disrupt the classroom. *See* 393 U.S. 503, 513 (1969); *Salehpour v. University of Tenn.,* 159 F.3d 199, 208 (6th Cir. 1998). Therefore, Plaintiff met the first prong of the *Ratliff* test. Furthermore, a question of fact remains for trial as to whether Plaintiff's actions of filing his civil rights race discrimination complaint against Defendants, promoting a chapter of the NAACP onto campus for the first time, speaking out on minority rights, and refusing to relinquish his seat at the KUC campus were a substantial factor in Stout's and Martin's alleged failure to count the write-in votes that Plaintiff received for the senator position from the College of Applied Science and Technology, where Stout and Martin have failed to come forward with evidence to support a legitimate reason for their failure to do so. *See*

Ratliff, 820 F.2d at 796 (holding that "the evidence contrasting the Board's pre-speech and post-speech attitudes towards Ratliff, combined with the evidence of post-speech vindictiveness verbally communicated to key players, clearly suffices to permit a reasonable inference that the speech motivated the Board not to renew Ratliff's employment contract"). Finally, Defendants have failed to come forward with evidence to show a legitimate reason for their failure to count the votes that Plaintiff allegedly received for the College of Applied Science and Technology senator position. Accordingly, genuine issues of material fact remains for trial as to whether Stout and Martin retaliated against Plaintiff for exercising his First Amendment rights which were clearly established at the time. *See Cameron,* 38 F.3d at 273 n.2.

Similarly, questions of fact remain regarding Plaintiff's claim that Stout and Martin violated his Fourteenth Amendment right to equal protection under the law when (1) Stout and Martin "retaliat[ed] against him for his speech, politics, and associational activities on behalf of minority student groups:" and (2) Stout and Martin deprived Plaintiff of the right granted to all other qualified student candidates under the applicable SGA rules and regulations to have his name appear on the official SGA ballot and to have his write-in votes tallied and reported.

"'To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.'" *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990) (quoting *Johnson v. Morel,* 876 F.2d 477, 479 (5th Cir. 1989) (*en banc*)). Here, it is undisputed that Plaintiff is a member of a protected class

inasmuch as he is an African American. *See, e.g., City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1985). To the extent that evidence exists on the record to show that Defendants counted the write-in votes received by white candidates, but did not count the votes received by Plaintiff -- the only black candidate on the ballot -- a question of fact remains for trial as to whether Defendants violated Plaintiff's equal protection right to be treated as white candidates similarly situated. Defendants have failed to come forward with evidence to support their purported reason for failing to count the write-in votes that Plaintiff allegedly received for the position of senator from the College of Applied Science and Technology and why the alleged reason is narrowly tailored to achieve a compelling government interest. *See Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1424 (6th Cir. 1996). Accordingly, genuine issues of material fact remain for trial as to whether Defendants violated Plaintiff's right to be considered for write-in candidacy to the student government in the same fashion as those write-in candidates who were white, and where Plaintiff's right to be treated equal to white individuals similarly situated was clearly established at the time.

However, I agree that Plaintiff failed to prove that he had a clearly established property interest at the time for which Defendants would have known they were intentionally depriving Plaintiff under the due process clause of the Fourteenth Amendment. *See, e.g., Christophel v. Kukulinsky,* 61 F.3d 479, 486 (6th Cir. 1995); *Woolsey v. Hunt,* 932 F.2d 555, 564 (6th Cir. 1991). Therefore, I would affirm the grant of summary judgment to Martin and Stout on this claim.

For the above stated reasons, a jury should be allowed to decide these factual disputes which Plaintiff has supported by documentary evidence; I therefore respectfully dissent from the majority opinion affirming the district court's order granting Defendants summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENVILLE

[Filed June 25, 1998]

No. 2:96-CV-412

MACK E. SCOTT,
Plaintiff,

v.

DORMAN STOUT, LAURIE PRICE, TONIA MARTIN, and EAST TENNESSEE STATE UNIVERSITY,
Defendants.

Judge Curtis L. Collier

MEMORANDUM

Before the Court is the Motion for Summary Judgment filed by Defendants Dr. Dorman Stout ("Dr. Stout"), Tonia Martin ("Martin") and East Tennessee State University,

CETSU") (Court File No. 11).[1] Plaintiff Mack E. Scott ("Scott") responded (Court File No. 16). For the following reasons, the Court will GRANT Defendants' motion.

I. PERTINENT FACTS

This is the second case Scott has had before this Court. In his first case, Scott sued ETSU and the Kingsport campus director, Joseph Tinnon, alleging he had been intentionally discriminated against during ETSU's elections for president of the Student Activities Council ("SAC") (Case No. 2:95-CV-135). The Court dismissed that case explaining, "The Court observes this case illustrates how difficult it is to resolve political issues in a court of law with our fixed and universal rules. The world of politics consists of personalities, compromises, favors, paybacks, grievances, allegations, loyalties and disruptions that are totally alien to the law. Transporting such matters into a forum as rigid as the law rarely leads to a result acceptable to those in the political sphere." Scott's current case presents another such circumstance. Scott contends his name was unfairly removed from the ballots for the Student Government Association senate and Martin and Dr. Stout refused to count write-in votes Scott received for the position of senator representing ETSU's College of Applied Science and Technology. Scott alleges Martin's and Dr. Stout's actions violated SGA's constitution and bylaws.

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[1]By agreement of the parties. Laurie Price was dismissed from this case on March 20, 1998 (Court File No. 9).

ETSU has four campuses and seven colleges. The seven colleges are Medicine, Nursing, Business, Arts and Sciences, Public and Allied Health, Education, and Applied Science and Technology. The colleges represent the student's major field of study at ETSU. All seven colleges are located at ETSU's main campus in Johnson City, Tennessee. For the convenience of the students, ETSU also has three satellite campuses--Bristol, Greeneville, and Kingsport. Since the colleges are not maintained at these satellite campuses, a student could not complete all their studies at the Bristol, Greeneville, or Kingsport campuses. However, a student could utilize one of the satellite campuses to take many of their preliminary courses before transferring to the University's Johnson City campus for the completion of their degree.

Scott is a forty-two year old black male. He enrolled in ETSU in August 1993 and his major field of study was in the College of Applied Science and Technology. Scott took some of his classes at the Kingsport campus.

At ETSU, Scott quickly became involved in student government activities. Scott was active in the local student government organization for the Kingsport campus known as the Student Advisory Council ('SAC"). Scott also served two terms in the main University's Student Government Association ("SGA") as a senator representing the Kingsport campus. On March 4, 1996, Scott submitted an election petition to again run for the position of SGA senator representing the Kingsport campus (Scott Affidavit, Court File No. 16, ¶ 18). When Scott submitted this petition he was not currently enrolled in any classes at the Kingsport campus nor was he preregistered to take any classes at Kingsport.

Since the time of his election petition, Scott has not taken any classes at Kingsport.

According to the SGA Constitution, an individual had to meet the following requirements to be qualified for a senator position in the SGA:

1. Must be a student at East Tennessee State University in satisfactory academic standing.

2. Must have successfully completed at least one full academic term at East Tennessee State University or have been a member of the junior senator program a minimum of four weeks.

(SGA Constitution, pp. 9-10, Exh. No. 1, Court File No. 16).

The Constitution also specified "Thirty-two seats shall be apportioned to the Student Senate in each general election, and this shall be the maximum size of the Senate. All of these seats shall be elected by the student body at-large." While all students were permitted to vote in the SGA elections, a review of the 1996 SGA election ballot reveals the thirty-two senator seats were apportioned among the colleges and the Kingsport campus as follows:[2]

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[2]At the time of the 1996 elections, the Bristol and Greenevitle campuses had not been completed so, those campuses were not apportioned seats on the ballot.

- Three seats for the College of Applied Science and Technology,
- Nine seats for the College of Arts and Sciences,
- Three seats for the College of Business,
- Four seats for the College of Education,
- Three seats for the College of Nursing,
- Three seats for the College of Public and Allied Health,
- One seat for the Kingsport campus, and
- One seat for the College of Medicine

(1996 SGA Election Ballot. Court File No. 11).

The remaining seats were apportioned for senator at large positions. The election for those positions was not until the fall of the next year.

During the 1996 elections, Tonia Martin was the president of the SGA. After the election petitions were submitted. Martin reviewed the petitions to confirm the applicants were in satisfactory academic standing (Martin Deposition, Court File No. 16, p. 54). Though this was an item not listed in the SGA constitution, Martin also checked whether the applicants were enrolled in the college or campus in which they were seeking election (*Id.*). During this check, Martin became concerned about the eligibility of four applicants (*Id.* at 55). Three of the applicants about whom Martin was concerned were white. It appeared each of these individuals were petitioning to be placed on the ballot for senator positions representing a college in which they were

not enrolled (*Id.* at 55).[3] The fourth applicant was Scott. Martin noticed Scott was applying to be a senator representing the Kingsport campus, however, Scott was not currently enrolled for classes at Kingsport nor was he preregistered for any fall classes at that campus (Martin Deposition, p. 55: Scott Deposition, Attached to Court File No. 11, pp. 11, 79).

Martin decided to convene the election committee to discuss the eligibility of these four applicants (Martin Deposition, p. 56). With respect to the formation of the election committee, the SGA Code of Laws provided:

> The elections committee shall be chaired by the Secretary of Interior. In the event of his/her absence, the Secretary/Treasurer of the S.G.A. shall preside over any meetings. The committee will be composed of the following members:
>
> 1. Secretary of the Interior
> 2. Secretary/Treasurer of the S.G.A.
> 3. Secretary of Public Relations
> 4. Two senators not seeking reelection, and
> 5. Two other students as

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[3]Martin explained, "There were three of them that were problems [sic] with the college that they had put down. Like, they had put down Education and the computer was showing me that they were in Arts and Sciences or whatever" (Martin Deposition, p. 55).

selected by the
Secretary of Interior

(SGA Code of Laws, p. 25, Exh. No. 8, Supplemental File to Court File No. 16)

The election committee was supposed to meet at least once each month "to discuss the S.G.A. general elections and any problems arising from their administration" (*Id.*). However, the Secretary of Interior, Jeff Whitaker, had not been taking an active role in the elections and no election committee had met or even been formed (Martin Deposition, pp. 58-61). Thus, .Martin selected Jerri Anne Boswell and Brian Parker to fill the spots of two senators not seeking reelection (*Id.* at 60-62). Martin then selected Ashley McKinney and Kathryn Taylor for the other two student positions (*Id.* at 61.).

The election committee meeting was held in Dr. Stout's office.[4] Martin describes the discussion at the meeting as follows:

Q: What did you say during the meeting?

A: What did I say during the meeting?

Q: Yes, ma'am. How did you introduce the problem?

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[4]At the time. Dr. Stout was ETSU's Vice President for Student Affairs and the SGA faculty advisor. Dr. Stout was also present for the election committee meeting.

A: They all walked in. After they got there, I said, "We have a situation with some ballots . . . " Excuse me. "...some petitions that had been turned in, and we need to discuss them." They said, "Okay, fine." I believe -- and I cannot exactly recall my verbiage, but I told them that there were three petitions that the students had wrote down one college and the computer tells me they're in a different college. "What do we do?" And they discussed among themselves, asked, you know, when's the deadline for the ballot to go off to print, since logistical things had to be . . . [ellipsis in original]

Q: Well, when was the deadline?

A: I don't recall that.

Q: Okay. What else did they discuss?

A: From that point, we discussed it, and I had no say in it whatsoever, I just presented that fact. They discussed it and decided that if these three students could bring proof to me of either, "A", me reading the computer screen wrong, or "B", that the computer is wrong, that they would accept that and that they would be allowed to run for what they had written down.

Q: Okay. So that took care of those three . . . [ellipsis in original]

A: Uh-huh (Affirmative).

Q: And no names were given, I take it?

A: No, sir.

Q: No petitions were shown to these people.?

A: No, sir, I had them in my hand. They didn't leave my hand.

Q: Okay. Then what did you say about Mr. Scott's petition.

A: Well, I didn't say that it was Mr. Scott's petition, that's for sure. I said that we have another situation. Someone has run for a seat that had been designated a satellite -- a-- let me think of the correct verbiage -- for a seat in which they are not taking classes at that campus. . . .

. . . .

Q: You just said someone was running for a seat at a campus where they are not taking any classes?

A: Right. "What will we do with this situation?" And the committee discussed it. And from that point, they decided, also, that if the person could bring -- could show proof of either me reading the computer screen wrong, or the

> computer being wrong, that we would accept that as -- and allow them to run for what they had written down.
>
> Q: If they were attending the campus?
>
> A: Yes.

(Martin Deposition, pp. 64-66).

Ultimately, the three white applicants proved they were in the colleges listed on their petitions and their names were included on the official ballot (*Id.* at 68). However, Martin's and Dr. Stout's attempts to contact Scott during the period between the election committee meeting and the printing deadline for the ballots were unsuccessful *(Id.* at 69). As it turned out, on March 6, 1996, Scott had left for a two week University sponsored trip to Africa (Scott Deposition, p. 78; Scott Affidavit, ¶ 20). It was not until he returned from the trip that Scott received the phone messages left for him by Dr. Stout explaining the election committee's decision regarding Scott's election petition (Scott Deposition, pp. 79-80). Scott immediately telephoned Dr. Stout and "demanded [his] name be placed on the [] official ballot, [but Dr.] Stout said it had already gone to the printers" (Scott Affidavit, ¶ 20).

Since the official ballots had already been sent to the printers, it was too late for Scott to be listed on the ballot, however, ETSU had two additional methods whereby an individual could attempt to be elected to the SGA. The student could run as either an official or unofficial write-in candidate. To be an official write-in candidate, the student had to file a

request. The benefit of being a candidate of this type is that the student's name would appear on a list at the polling place as a write-in candidate. However, an individual could vote for any student by simply writing their name on the ballot. This was known as the unofficial write-in process.

Scott decided to run as an unofficial rather than an official write in candidate. Scott explained,

> . . . the conditions that they put on being a write-in candidate is I'd have to basically agree with their position that I could only be a write-in candidate in the College of Applied Science and Technology. That was the only way that I could be an official write-in is be under that category. Now, in my mind, that's admitting that I agreed with what they just did, which I didn't. Because I knew I could write myself in. There was no restriction. It was all at-large. And if I'd go along with that then I'd say I agree with what they just did, taking my name off the ballot. So I didn't want to leave that impression. So to stay with my point and stay focused I simply used the option that was available to me. I could write myself in anywhere I liked.

(Scott Deposition, p. 55).

In his "unofficial write-in" campaign, Scott told some students to write his name on the ballot under the College of

Nursing (*Id.* at 58).[5] In other situations, Scott gave the students "carte blanche" as to where to write his name on the ballot. In his deposition, Scott explained this strategy as follows:

> Q: . . . Did you tell anybody to write you in, in the college you were enrolled in?
>
> A: No. Some people, they said -- I gave them carte blanche. "Scottie, you know, I'm going to write you in." I said, "Pick a place where there's nobody running and write me in there." I said, "If there's an open seat, write me in." So I gave several people carte blanche. And I don't remember who they were. So that's the way I campaigned, basically carte blanche. "Just write me in somewhere. It doesn't matter." And that was to make the point that, you know, I don't need to be stuck in this one slot because there's nothing prohibiting it. I just simply, you know, validated my point. That was the argument. I was saying, you know, "This is legitimate. This is a legitimate process. It's provided for in the Constitution and Code of Laws. I can do this. I don't need to accept your ruling which was done illegally and contrived to begin with." You know, in my mind I was thinking about basically, you

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[5]In his affidavit, Scott contradicts this statement and testifies he did not tell students to write his name on the ballot under the College of Nursing (Scott aff., ¶ 2.3).

> know, the law of tenants. You know, if somebody does something and you don't agree with it, you've got to make sure that they understand you don't agree with it. Because if you do anything that appears that you agree with it, then it's over. And I don't want to do that. Because I didn't agree with what they had did [sic].

(*Id.* at 59).

Despite Scott's "carte blanche" campaign strategy, Derek Blix, Kim Williams,[6] Chadwick Lincoln Lamer Brown, and Bonnie Silvers, students at ETSU, all testified they wrote Scott's name on the ballot under his own college, the College of Applied Science and Technology (*See* Affidavits of Students, Exh. Nos. 15-18, Court File No. 16). Scott also wrote his name on the ballot. However, Scott simply wrote "Mack Scott, senator" without specifying a particular college or campus (Scott Deposition. p. 56).

After the election, the ballots were counted. When questioned about Scott's write-in votes, Martin testified,

> Q: You're not aware that people wrote him in under the College of Nursing and he was unopposed or was an open seat and won the election?

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[6]Ironically, Scott testified Kim Williams wrote his name on the ballot under the College of Nursing (Scott Deposition, pp. 57-58).

A: Not that I recall. I remember seeing his name a couple of times on the ballots, but it was either not in correct form or -- I mean, you had to be specific on what you wrote in.

Q: Well, what did you have to be specific about?

A: Had to write it under the appropriate college. And then from there, the ones that were wrote in, we double checked, that that was the college, and went from there. Mr . . . [ellipsis in original]

Q. So in other words, you are applying these same criteria that you'd announced at the March 5 meeting?

A: Yes, sir.

Q: In other words . . . [ellipsis in original]

A: We checked . . . [ellipsis in original]

Q: My question is, didn't his name appear as a write-in on several ballots for the College of Nursing?

A: I remember his name as appearing, I don't remember for what college it was.

Q: Well, what did you do about the fact that it appeared there?

A: We tallied the votes as we did with the rest of them, and I don't specifically remember double checking his college, so there must have been someone that beat him out on votes. I really don't remember at this point.

(Martin Deposition, pp. 78-79).

When the final votes were tallied, Scott was not elected to any SGA position. Scott then filed a complaint with the Student Court.[7] Scott's complaint was to grieve the fact his name was left off the official ballot. When Scott was not permitted to run as a senator for the Kingsport campus, Scott felt the SGA Constitution and Code of Laws had been violated. Scott explained in his complaint the relief he was requesting, " . . . I demand that I retain my ETSU/UT at Kingsport SGA Senate seat and the unopposed candidate for this seat that was the result of these violations of law and my rights, [sic] be removed from said seat! I am convinced, [sic] that had I been on the ballot I would have easily defeated the opposition for this seat. As a result of this incident, I reserve the right to pursue this and any other remedy for these violations of my rights that I deem appropriate and necessary" (Scott's April 3, 1995 Memorandum to the Associate Vice President of Student Affairs, Exh. No,. 9, Court File No. 16). On April 15, 1996, the Student Court held a hearing on Scott's complaint. Scott argued the case on his own behalf and

[7]Though not detailed by either party, it appears the Student Court is a student judicial body at ETSU authorized to adjudicate student complaints and infractions.

Martin argued the case for the SGA's position.[8] The decision of the Student Court was as follows'

1. The Student Court upholds the decision of the SGA Election Commission to disqualify Mack Scott as a candidate for the SGA Senate. At the time Mr. Scott submitted his candidacy papers for the ETSU-Kingsport seat, he was not enrolled at ETSU-Kingsport.

2. The Student Court recommends that the Student Government Association amend its By-Laws to clarify that senatorial candidates are elected on a proportionate basis from the various colleges; that candidates must be enrolled in the college they wish to represent; and that one senator is elected from the enrolled student body at ETSU-Kingsport.

3. The Student Court recommends that should Mr. Scott wish to become a member of the SGA Senate, that he

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[8]Scott contends it was error for Martin to argue the case before the Student Court (Scott aff., ¶ 24). The person who was supposed to present any case on behalf of the SGA was the Secretary of Legislative Affairs, Mark Nabors (SGA Constitution. p. 4). However, Martin felt Nabors had a conflict because Nabors was elected president of the SGA on the same ballot Scott was contesting (Martin Deposition, p. 86).

> apply through the regular selections process in the fall to gain a senate seat representing the college in which he is enrolled or an at-large seat.

(Decision of the Student Court, Exh. No. 10, Court File No. 16).

Scott appealed the Student Court's decision to the President of ETSU, Roy S. Nicks, but Nicks upheld the decision. On August 16, 1996, Scott filed suit in this Court against Dr. Dorman Stout, Tonia Martin, and Laurie Price,[9] in their individual capacities. Scott also sued ETSU. In his complaint, Scott alleged the Defendants violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Scott also alleged violations of 42 U.S.C. §§ 1981, 1983, and 1985(3).

II. STANDARD OF REVIEW

Under *Fed. R. Civ. P.* 56(c), the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show that no genuine issue of material fact exists, *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1347 (6th Cir. 1994); Kentucky Div., *Horsemen's Benev. & Prot. Assoc., Inc. v. Turfway Park Racing Assoc., Inc.,* 20 F.3d 1406, 1411 (6th Cir. 1994), and the Court must view the facts and all inferences drawn therefrom in the light most favorable

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[9]By agreement of the parties, Laurie Price was dismissed from this case on March 20, 1998 (Court File No.9).

to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oakland Gin Co., Inc. v. Marlow, 44* F.3d 426,429 (6th Cir. 1995); *City Management Corp. v. U.S. Chemical Co., Inc.*, 43 F.3d 244. 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrerr,* 477 U.S. 317, 324 (1986); *Lansing Dairy,* 39 F.3d at 1347; *Horsemen Benev.*, 20 F.3d at 1411. If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex,* 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52. There must be some probative evidence from which the jury, could reasonably find for the nonmoving party. If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the

evidence presented, it may enter a summary' judgment. *Id.; Lansing Dairy,* 39 F.3d at 1347; *Horsemen's Benev.,* 20 F.3d at 141.1.

III. DISCUSSION

The Court will first address the claims against ETSU and then the claims against Dr. Stout and Martin, individually.

A. Claims Against ETSU

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

A cause of action under Title VI requires (1) discrimination based upon race or national origin and (2) the entity allegedly discriminating against the plaintiff receives federal financial assistance. *See National Ass'n of Govern. Emp. v. City Pub. Serv.,* 40 F.3d 698, 706 n.9 (fth Cir. 1994); *Baker v. Board of Regents of State of Kansas,* 991 F.2d 628, 631 (10th Cir. 1993). For the purposes of this motion only, Defendants stipulate to the assumption, *arguendo,* ETSU's student government association receives federal government

assistance and is thus, covered by Title VI. The remaining issue then is whether Scott has presented sufficient evidence of discrimination based upon race or national origin.

Scott could prevail on his Title VI claim either by proving intentional discrirmination or by showing ETSU's actions resulted in a disparate impact on groups protected by Title VI. *Buchanan v. City of Bolivar, Tennessee,* 99 F.3d 1352, 1356 and n.5 (6th. Cir. 1996); *See also Young v. Montgomery Cnty Bd. of Education,* 922 F. Supp. 544, 548-549 (M.D. Ala. 1996). In this case, Scott seeks compensatory and punitive damages from ETSU. In a disparate impact case under Title VI, the relief available to a prevailing plaintiff is limited to an injunction identifying the violation and enjoining its continuance. *Scelsa v. City University of New York,* 806 F. Supp. 1126, 1140 (S.D.N.Y. 1992) *(citing Guardians Ass'n v. Civil Serv. Comm,* 463 U.S. 582,596 (I983)). Thus, Scott's case is not appropriate for a disparate impact theory.[10]

With respect to a claim of intentional discrimination, the United States Court of Appeals for the Sixth Circuit recently explained,

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[10]For many reasons, Scott also could not prevail on a disparate impact theory. To make a prima facie case on such a theory, Scott must show "a facially neutral [] practice has a racially disproportionate adverse effect." Young, 922 F. Supp. at 549-550. While ETSU's actions affected Scott, they also affected three other students--all white. Furthermore, ETSU has presented a legitimate nondiscriminatory reason for its actions and Scott has failed to present any evidence of pretext.

> [T]o avoid summary judgment on a claim under § 2000d, a plaintiff must create a genuine issue of material fact that the defendant intended to discriminate on the basis of race. . . . [P]laintiff must demonstrate that the decision to exclude [the plaintiff] from a federally financed program was motivated by race and that his race was a determining factor in the exclusion. In other words, proof of discriminatory intent is crucial. It follows that where the decisionmaker is motivated by a factor other than the excluded party's race, there can be no intentional discrimination.

Buchanan, 99 F.3d at 1356 (internal citations omitted) (footnote omitted).

It is important to note Scott makes two different claims regarding intentional discrimination. Scott alleges both the school's refusal to place his name on the official ballot for a senator position at Kingsport and the school's failure to count the write-in votes he received for the senator position representing the College of Applied Science and Technology were acts of intentional discrimination under Title VI.[11]

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[11]Scott's complaint never alleged a violation of Title VI as a result of the school's failure to count write-in votes he received under the College of Applied Science and Technology. This also does not appear to have been an issue during the discovery process. *See* Martin Deposition, pp. 78-79 (Martin was only questioned about whether Scott may have won a seat in the College of Nursing, not whether there were sufficient votes for him to win a senate seat representing the College of Applied Science and Technology);

However, Scott fails to present sufficient proof of intentional discrimination on either of these allegations to survive summary judgment.

In his affidavit, Scott alleges ETSU failed to put his name on the ballot and/or refused to count write-in votes under nee College of Applied Science and Technology because Martin and/or Dr. Stout were unhappy when:

- Scott defeated another candidate, Chad Nixon, in the 1995 SGA senate elections (Scott Affidavit, ¶¶ 9 and 10);

- Scott and several other SGA senators utilized parliamentary procedures to stall the confirmation of Martin's cabinet and student court appointments (*Id.* at ¶ 10)

- Scott voiced his "opinion regarding what appeared to be racist activities by certain

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Defendants' Motion in Limine, Court File No. 20. seeking to exclude Kim Williams, Bonnie Silvers, Derek Blix, and Chadwick Lincoln Lamer Brown as witnesses. *See also* footnote number 6.

However, recognizing the ease with which a complaint could be amended to conform to the proof developed, the Court has also considered this allegation made by Scott.

members of the SGA." Scott felt minority groups were slighted when the SGA distributed student activity funds (*Id.* at ¶ 13);

- Scott successfully organized a student chapter of the NAACP at ETSU's Johnson City campus (*Id.* at ¶ 16).

Other allegations by Scott include:

- Martin and Dr. Stout misrepresented the SGA Constitution and by-laws in a phone conversation with Scott (*Id.* at ¶ 9);

- Martin attempted to pass a senate resolution which would have amended the constitution to state that students may only run for senate positions in the college in which they are enrolled and only students at the Kingsport campus could run for the Kingsport seat (*Id.* at ¶ 10);

- During the Fall of 1995, Martin refused to list Scott on the ballet for Homecoming King as "Scottee" Scott as he had requested. Instead, Martin utilized Scott's formal name of Mack Scott. Scott contends this action displayed Martin's personal animosity toward him (*Id.* at ¶ 14);

- Martin and Dr. Stout never corrected the "parliamentary insult" committed by Melinda Owens, the SGA vice-president, when she

would refuse to recognize Scott whenever he was the first to raise his hand to speak on a particular issue (*Id*);

- Martin permitted "several hostile Student Advisory Council members [the local student government association for Kingsport] to berate [him] and challenge [his] ability to represent their interest" (*Id.* at ¶ 15);

- The election committee Martin selected was a "rump committee" (*Id.* at ¶ 1).

With respect to the reasons Scott presented for Martin's and/or Dr. Stout's alleged displeasure with him, Scott has only presented the Court with assertions and conclusions. There has been no evidence to connect the failure to place Scott's name on the official ballot or to count votes he may have received under the College of Applied Science and Technology with these activities. Furthermore, most of the activities Scott listed as displeasing Martin and/or Dr. Stout do not concern racial animus. As the Sixth Circuit explained, "where the decisionmaker is motivated by a factor other than the excluded party's race, there can be no intentional discrimination." *Buchanan,* 99 F.3d at 1356 *(citing Hazen Paper Co. v. Biggins,* 507 U.S. 604, 609 (1993)).

For there to be a violation under Title VI, race must be the motivating factor and the determining factor in the decision to exclude an individually from a program financed by federal funds. *Id (citing Guardians Ass'n,* 463 U.S. at 582). Scott's other allegations do not raise even the inference that race was the motivating factor in any actions taken by

ETSU. Accordingly, the Court will **GRANT** ETSU's motion for summary judgment on Scott's claim of a Title VI violation.

2. 42 U.S.C. §§ 1981, 1983, and 1985(3)

This Court has previously held ETSU is an arm of the State of Tennessee. *Ejlali v. East Tennessee State University*, Case No. 2:94-CV-223, February 13, 1997 unpublished decision, Court File No. 44.[12] Thus, Scott's suit against ETSU for alleged violations of 42 U.S.C. §§ 1981, 1983, and 1985(3) are equivalent to a suit against the State. However, the State maintains sovereign immunity against these claims. *See e.g., Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); *Hutsell v. Sayre, 5* F.3d 996, 1002 (6th Cir. 1993) (suit against University of Kentucky Board of Trustees and its employees fairly characterized as suit against the state; Board and employees sued in official capacity entitled to sovereign immunity against § 1983 claims); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321, 324 (6th Cir. 1967) (State of Tennessee is not liable as a person under § 1983); *United States v. State of Ilinois,* 343 F.2d 120, 120 (7th Cir. 1965) (State not liable as a person under §§ 1983, 1985, and 1986); *Chinn v. City University of New York School of Law at Queens College,* 963 F. Supp. 218, 224 (E.D.N.Y. 1997) (plaintiff's § 1981 claims against City University of New York was barred by the Eleventh .Amendment); *Chacko v.*

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[12]Scott's counsel is familiar with this decision as he was also Plaintiff's counsel in Ejlali.

Texas A & M University, 960 F. Supp. 1180, 1198 (S.D. Tex. 1997) (and cases cited therein) ("Neither § 1981 nor § 1983 contains a congressional waiver of a state's eleventh amendment immunity,). Accordingly, the Court will GRANT ETSU's motion for summary judgment on Scott's claims for violations of 42 U.S.C. §§ 1981, 1983, and 1985(3).

B. Claims Against Martin and Dr. Stout, Individually

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

A claim under Title VI can only be asserted against the entity receiving the federal Financial assistance. *Buchannan,* 99 F.3d at 1356 ("Plaintiff's claim also fails because she asserts her claim against [the police officers] and not against the school, the entity allegedly receiving the financial assistance"). Thus, Scott's claim against Martin and Dr. Stout, individually, fails.

Scott's claim against Martin and Dr. Stout, individually, would also fail on the merits because, as discussed in Section III(A)(i) of this Memorandum, Scott has failed to present evidence of intentional discrimination because of his race. Accordingly, the Court will **GRANT** Martin and Dr. Stout's motion for summary judgment on Scott's claim of a violation of Title VI.

2. 42 U.S.C. §§ 1981, 1983, and 1985(3)

Assuming, *arguendo,* Scott could prove a violation by Martin and/or Dr. Stout of either 42 U.S.C. §§ 1981, 1983, or 1985(3), Scott has failed to prove Martin and Dr. Stout are not entitled to qualified immunity. Martin was acting in her capacity as the President of the SGA and Dr. Stout was acting in his capacity, as ETSU's Vice President for Student Affairs and the SGA's faculty advisor when they determined Scott's name should not be placed on the official ballot, and when they determined Scott had not received sufficient votes to be elected to a senatorial position in the SGA. Thus, Martin's and Dr. Stout's activities were discretionary. As Scott has failed to produce any evicience Martin and Dr. Stout "violated a right so clearly established that any official in defendants' position would have clearly understood that they were under an affirmative duty to refrain from such conduct," Scott has failed to prove Martin and Dr. Stout are not entitled to qualified immunity. *See Rich v. City of Mayfield Heights,* 955 F.2d 1092, 1095 (6th Cir. 1992). Accordingly, the Court will GRANT Martin's and Dr. Stout's motion for summary judgment on Scott's claims for violations of 42 U.S.C. §§1981, 1983, and 1985(3).

IV. CONCLUSION

It is evident the parties did not literally follow the dictates of the SGA Constitution and By-laws. However, transgressions of this type rarely rise to the level of constitutional or Title VI violations to be adjudicated in a federal court. In this case, the evidence clearly does not meet the applicable standard. For this reason, the Court will **GRANT** Defendants' Motion for Summary Judgment. There

being no other issues, the Court will also **ORDER** the case **DISMISSED**.

An Order will enter.

ENTER:

/s/_____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

Cause No. 2:96-CV-412

MACK EDWARD SCOTT, *Plaintiff*,	)
v.	)
DORMAN STOUT, LAURIE PRICE, TONIA MARTIN, and EAST TENNESSEE STATE UNIVERSITY, *Defendant*.	)

AFFIDAVIT OF DEREK BLIX

I, Derek Blix, being duly sworn, depose and say upon personal knowledge:

1. I am currently a resident of Kingsport, Tennessee and am twenty-seven (27) years of age.

2. I am currently matriculating at East Tennessee State University and am majoring in Criminal Justice. I work after school hours at Freedom Hall in Johnson City, Tennessee. In April 1996, I was a sophomore at East

Tennessee University. I voted in the Student Government Association elections including the elections of Senators to the SGA Senate. I cast my ballot at the voting place in front of the Rogers-Stout Building on the campus of East Tennessee State University.

3. On that ballot, I wrote in the name of Mack "Scottie" Scott for the office of Senator under the College of Applied Science and Technology. I knew that Mr. Scott was enrolled in that particular college. I had known Mr. Scott for over a year and knew that he had been a Senator to the SGA, and believed that he was worthy of reelection.

4. At the time, I did not know why his name did not appear in print on the official ballot. I knew however that I could write his name in as a Senator in a location on the ballot where there were senatorial positions open.

This May 14, 1998

/s/_____
DEREK BLIX

STATE OF TENNESSEE:

COUNTY OF SULLIVAN:

SWORN TO AND SUBSCRIBED BEFORE me, Donna F. Weatherholtz, a Notary Public at Large for the State of Tennessee.

This May 14, 1998

/s/_____
NOTARY PUBLIC

My Commission Expires: 12-5-99

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

Cause No. 2:96-CV-412

MACK EDWARD SCOTT,	)
Plaintiff,	)
	)
v.	)
	)
DORMAN STOUT, LAURIE PRICE,	)
TONIA MARTIN, and EAST	)
TENNESSEE STATE UNIVERSITY,	)
Defendant.	)
	)

AFFIDAVIT OF CHADWICK LINCOLN LAMAR BROWN

I, Chadwick Lincoln Lamar Brown, being duly sworn, depose and say upon personal knowledge:

1. I am currently a resident of Hawkins County, Kingsport, Tennessee and operate a business known as the Wellchip Group. In the Spring of 1996, I was a student regularly enrolled at East Tennessee State University in Johnson City, Tennessee.

2. I voted in the April 1996 SGA student elections at the poling both which had been erected by the SGA

between Sam Wilson Hall and Gilbreath Hall. I voted in the early afternoon on the first day of the election.

3. I wrote in the name of Mack Scott as a "write-in" candidate under the College of Applied Science and Technology. I wrote in Mr. Scott's name under that college because I knew he was enrolled in it. I was aware of Mr. Scott's participation in the Student Government Association Senate and desired him to be reelected to that position.

4. I was extremely active in several campus groups. I worked on the Student Activities Committee, the Residences Hall Association. Tau Kappa Epislon, Delta Sigma Pi, the American Marketing Association among others. As an African-American student active in these various and other organizations, I knew Mr. Scott to be an extremely active African-American student on the East Tennessee State University Campus and was aware of his participation in the Student Government Association.

This May 15, 1998

/s/_____
CHADWICK LINCOLN LAMAR BROWN

STATE OF TENNESSEE:

COUNTY OF SULLIVAN:

SWORN TO AND SUBSCRIBED BEFORE me, Donna F. Weatherholtz, a Notary Public at Large for the State of Tennessee.

This May 15, 1998

/s/_____
NOTARY PUBLIC

My Commission Expires: 12-5-99

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

Cause No. 2:96-CV-412

MACK EDWARD SCOTT, *Plaintiff*,	)
v.	)
DORMAN STOUT, LAURIE PRICE, TONIA MARTIN, and EAST TENNESSEE STATE UNIVERSITY, *Defendant*.	)

AFFIDAVIT OF BONNIE SILVERS

I, Bonnie Silvers, being duly sworn, depose and say upon personal knowledge:

1. I am currently a resident of Johnson City, Tennessee. I am currently a senior enrolled at East Tennessee State University with a major in social work.

2. In April 1996 as a student, I voted in the Student Government Association senatorial elections and cast my ballot at the Culp Center area known as the Cave. Mack Scott, whom I had known previously, had asked me and other students to write him in on the ballot. I saw that there was an open seat available under the college of Applied Science and

Technology and wrote Mr. Scott's name in under that college.

3. In past elections, I had written other candidates in for senate seats and was aware that write-ins were a valid way to elect student senators. There was no announced requirement that a candidate could be written in only under the college he was enrolled in. In April 1996 however, Mack Scott was the only individual whom I voted for as SGA Senator.

This May 12, 1998

/s/_____
BONNIE SILVERS

STATE OF TENNESSEE:

COUNTY OF SULLIVAN:

SWORN TO AND SUBSCRIBED BEFORE me, Charlton R. Devault, a Notary Public at Large for the State of Tennessee.

This May 12, 1998

/s/_____
NOTARY PUBLIC

My Commission Expires: 11/18/98

Affidavits of ETSU Students Who Voted for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

Cause No. 2:96-CV-412

MACK EDWARD SCOTT,
Plaintiff,

v.

DORMAN STOUT, LAURIE PRICE, TONIA MARTIN, and EAST TENNESSEE STATE UNIVERSITY,
Defendant.

AFFIDAVIT OF KIM WILLIAMS

I, Kim Williams, being duly sworn, depose and say upon personal knowledge:

1. I am currently a senior enrolled at East Tennessee State University. I have one degree in criminal justice and am seeking a second degree in sociology. I am resident of Kingsport, Sullivan County, Tennessee.

2. In the April 1996 Student Government Association senatorial elections, I cast my ballot in the Culp Center area known as the Cave. I wrote Mack Scott's name in, as "Scottie" Scott, for the office as Senator under the College of Applied Science and Technology. I also wrote in

the name of Mark Beatty, another student whom I believed would make a good senator in as senator for the college of Arts and Sciences.

This May 14, 1998

/s/_____
KIM WILLIAMS

STATE OF TENNESSEE:

COUNTY OF SULLIVAN:

SWORN TO AND SUBSCRIBED BEFORE me, Donna F. Weatherholtz, a Notary Public at Large for the State of Tennessee.

This May 14, 1998

/s/_____
NOTARY PUBLIC

My Commission Expires: 12/5/99

APPENDIX D

SGA ELECTION BALLOT
APRIL 2-3, 1996

[Fold-out]

1348 total

East Tennessee State University
STUDENT GOVERNMENT ASSOCIATION

SGA ELECTION BALLOT

APRIL 2-3, 1996

ETSU
East Tennessee State University

USE NO. 2 PENCIL ONLY

ACCEPTABLE MARK ●

UNACCEPTABLE MARKS ⊘ ⊗ ○ ⊘

YES ○ | NO ●
551 | 616

"ETSU seeks to meet the strong interest/need expressed by students for a quality fitness/recreation/wellness center on campus. Included would be space for weight lifting, aerobics, aquatics, basketball, beach volleyball, fitness testing, martial arts, wellness educational programs, and a child care service. Academic classes and athletic practices would not be scheduled in the facility. Students who stop enrollment or graduate before the facility is built would receive use for an equal number of semesters without paying a user fee. Do you favor a required $60 per semester student fee beginning fall 1996 for construction/operation of this new facility?"

YES ● | NO ○
880 | 154

Do you approve of allowing SGA to reorganize its Code of Laws by subject and the date on which legislation was passed?

USING CIRCLES BELOW, VOTE FOR UP TO MAXIMUM INDICATED

PRESIDENT (1)	VICE-PRESIDENT (1)	SEC./TREAS. (1)	APPLIED S&T (3)
○ MARK NABORS 962	○ JASON BERRY 960	○ JOY FULKERSON 941	○ JAMES BARKER 880
○	○	○	○ Brad Singletary 51
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○

ARTS & SCIENCES (5)	BUSINESS (3)	EDUCATION (4)	NURSING (3)
○ CURTIS ISABELL 346	○ DAVID SCHWERD 298	○ KATRINA ANDERSON 388	○ [illegible]
○ CORBY YARBOROUGH 348	✓ Matt Jones 295	○ SUSAN NEAL 444	○ Sara [illegible] 21
○ SARAH THOMPSON 372	✓ Justin Wright +12	○ DAVID HUFFMAN 465	○ Amy Cook 12
○ JOSH HOLDEN 331	○ [illegible] 9	○ KRISTEN GAINS 504	✓ [illegible] 16
○ ALYSSA WADDELL 475	○	○	○
○ STEPHANIE BAUER 359	○	○	○
○ KENDRA BOND 329	○	○	○
○ MARIE PIBURN 331	○	○	○
○ ERIC SINCH 352	○	○	○
○	○	○	○

PUB + A.H. (3)	KUC (1)	MED. SCHOOL (1)	WRITE INS (INDICATE POSITION & NAME OF STUDENT)
○ SUZANNE LONG 590	○ SANDRA LARKINS 824	○	○
○ JASON ROBERTSON 420	○	○	○
○ CHAD NIXON 429	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○
○	○	○	○

SJ
EX. #13

BEST AVAILABLE COPY

APPENDIX E

EAST TENNESSEE STATE UNIVERSITY STUDENT GOVERNMENT ASSOCIATION (SGA) CONSTITUTION

REVISED JANUARY 1996

* * * * *

. . . defined by law. All presidential appointments shall be confirmed by the Student Senate in accordance with this Constitution.

Section 16. Incompatible Offices and Exclusions. No person may serve in two or more Student Government offices simultaneously.

Section 17. Oath of Office. Before assuming office, all officials of the Student Government shall take the following oath or affirmation:

> "I,_____, solemnly swear (or affirm) to persevere in my duties as a representative of the students of East Tennessee State University, and to serve the concerns of the study body with diligence and honesty. I do solemnly swear (or affirm) to execute my office faithfully and to respect and preserve the Constitution on which our Student Government is founded."

The oath of office shall be administered by a justice of the Student Court or the president pro tempore if a justice is not available.

Section 18. Succession. In the event that the Student Government president shall become unable to execute the responsibilities of his/her office, the vice president shall become President. If the president and the vice president are both unable to remain in office, the secretary-treasurer shall become president and a new vice president shall be appointed by him/her and confirmed by two-thirds of the senate present and voting. In the event that the vice president or the secretary-treasurer shall become unable to serve, the president shall name a successor to the vacant post whose appointment must be confirmed by two-thirds of the Senate present and voting.

Article III. Legislative Branch

Section 1. Legislative Power. The legislative powers of the Student Government Association shall be vested in the Student Senate.

Section 2. Student Senate. The Student Senate shall be the law-making body of the Student Government and shall be composed of members elected in general elections by the student body of East Tennessee State University, or appointed in compliance with this Constitution.

Section 3. Qualifications anti Duties of Senators.

A. Qualifications:

1. Must be a student at East Tennessee State University in satisfactory academic standing

2. Must have successfully completed at least one Full academic term at East Tennessee State University or have been a member of the junior senator program a minimum of four weeks

B. Duties:

1. Required to work one hour per week in the Student Government Office

2. Conscientious attendance and active participation in Student Government meetings, standing senate committees, and any other functions of SGA

3. To represent to the best of his/her ability the student body of ETSU voicing the concerns of the student body as they arise

4. As related to voting on legislation, 606 applications, etc., that come before the senate, the senator should keep an open mind in voting so as to better the education and student life at ETSU, disregarding personal feelings and differences, always keeping in mind the welfare of the entire student body

Section 4. Appointment of Senate Seats. Thirty-two seats shall be apportioned to the Student Senate in each general election, and this shall be the maximum size of the Senate. All of these seats shall be elected by the student body at-large. The order of the names on the ballot shall appear on the general election ballot in random order to be determined by the Secretary of Interior, while supervised by one representative from the three branches of Student Government.

Section 5. Officers of the Senate. The Student Senate shall choose officers to assist in the operation of the Senate.

A. The Student Senate shall choose from their own membership the following officers:

1. President Pro Tempore

   Duties:

   a. Preside over senate meetings during the vice president's absence or incapacity

2. Senate Secretary

   Duties:

   a. Performance of the clerical duties of the senate including preparation of legislation to the senate and for presentation of the final laws and acts to the

vice president, secretary-treasurer, and the secretary of legislative affairs

3. Parliamentarian

Duties:

a. Serve as the sole interpreter of parliamentary procedure for the Student Senate

b. Appointed by the vice president of SGA and confirmed by a two-thirds vote of the senate

c. The parliamentarian shall serve as chairman of the Senate Rules Committee for parliamentary procedure

B. The Student Senate may elect other officers as necessary for the performance of its duties, so long as the title, qualifications, and duties of each office are clearly specified by law.

C. Each of these officers shall be elected by the Student Senate from its own membership and by a majority of senators present and voting. Any officer may be removed from his/her post for malfeasance or nonfeasance at the discretion of two-thirds of the senate present and voting (ballot vote).

D. In the event that an officer of the senate shall become unable to execute the duties of his/her office, the senate shall elect a successor or the vacant post who shall serve to the remainder of his/her term of office.

E. No person may serve in two or more Senate offices simultaneously.

Section 6. Presiding Officers of the Senate. The vice president of the student Government shall preside over meetings of the Student Senate. The president pro tempore of the senate shall preside in the vice president's absence or incapacity to serve. The presiding officer of the senate shall appoint all committees of the senate with the advice and consent of the senate. All such committee appointments shall be subject to approval ora majority of the Senate present and voting.

Section 7. Terms of Office. Student senators shall be elected for a term of office lasting one year as specified in this Constitution.

Section 8. Student Senate Vacancies. The Student Senate shall have the power to fill all vacant senate seats. Persons appointed to a vacant senate seat shall serve only the remainder of

* * * * *

B. The public laws shall appear in the appropriate title according to the date of enactment, the oldest coming first.

C. The sections of the public laws shall be paragraphs of the Code. Each paragraph shall be designated with its reference number. Upon invalidation by the senate or judicial review, the paragraph and its number shall not appear again.

D. The paragraphs of the assembled public laws shall be numbered consecutively from 100 in each title of the Code.

E. No public law shall be divided among two or more titles, but each public law shall be retained in the most appropriate title.

F. Each public law shall be preceded by a short subject title which shall state the purpose of its contents. Each public law shall be closed with the date of original passage, as well as the date(s) of any revisions.

Section 4. Correction Procedure. In the case of repeal of a part of any paragraph, the wording shall be omitted from the edition or revision, and in its place shall appear the amendment. But in the case of a part of any paragraph being invalidated by judicial review, the portion invalidated shall not be omitted, but shall be underscored and cross-referenced to the decision regarding the invalidation.

Article VI. General Elections

Section 1. Deciding Election Dates. During the first meeting of the academic year, each new senate shall decide

upon the date and location(s) for the upcoming Student General Election, and the date upon which the newly-elected members are to assume their duties. This task may be accomplished by a motion from the floor of the senate and acceptance by two-thirds of the members present. Once decided upon, these dates can only be changed during the fall semester by a two-thirds vote of the senate present and voting, provided there is just cause for such a change.

Section 2. Qualifications For Candidates. No person shall be allowed to have his name appear on the general election ballot for any office to which he does not meet the qualifications.

Section 3. Supervisor of the General Elections. The student Government Secretary of Interior shall supervise the general elections proceedings.

Section 4. Election Law. The Student Senate shall be empowered, by means of law, to establish and prescribe regulations and standard procedures for the conduct of the General elections.

APPENDIX F

ETSU SGA CODE OF LAWS

* * * * *

TITLE IV

CAMPUS ELECTIONS

ARTICLE 1 PROCESS FOR CANDIDATES

Section 1 General Election Petition Act

A. A student shall be allowed to have his/her name appear on the General Election Ballot upon the presentation of a petition, the form of which shall be supplied to the candidate by the Student Government.

B. The Petition to Enter the Ballot for offices, elective to the Executive Branch, shall require the signatures and identification numbers of one hundred fifty (150) students enrolled at East Tennessee State University.

C. The Petition to Enter the Ballot for Student Senate seats shall require the signatures and identification numbers of seventy-five (75) students enrolled at East Tennessee State University

D. The Petition to Enter the Ballot must contain the following information:

Name _____
ID Number _____
Campus Box _____
Phone (optional) _____
*Hours Earned _____
*Dates of Attendance at ETSU _____
*QPA _____
Candidate's signature _____

*These shall be certified by the Vice President for Student Affairs of his designated representative.

**VP for Student Affairs Signature _____
**Signature will be obtained by Secretary of Interior.

E. All petitions found to be incomplete, falsified, or incorrect shall be void. The Secretary of Interior shall be empowered to consult with the Vice President For Student Affairs or his/her designated representative for the purpose of verifying any information listed on a Petition to enter the Ballot. This section shall be included on the petition form just above the portion where the candidate must affix his/her signature.

F. All Petitions to Enter the Ballot must be received by the Secretary of Interior no later

than 4 p.m. by the deadline date stated on the Elections Form, to the Student Government Offices, with the exception of write-in candidates who will be governed under the auspices of Title V's Write-in-Candidacy Act, in order to appear on the Election Ballot and Election Board.

G. Public notices of the Student Government General Elections shall be issued by the Secretary of Public Relations at least 25 class days prior to the first day of the general elections.

H. The public notice of the general elections shall consist of public announcements specifying:

1. The offices to be elected, as well as the qualifications for these offices.

2. Where to obtain and return petitions.

3. The deadlines for obtaining and returning petitions.

4. The dates of the general elections, the location of the polling places, and the hours of operation for the polling places.

G. Public notices shall be issued to the official campus newspaper and to the official campus radio station, and to the appropriate

information officials of the university branch centers.

Section 2 Write-In Candidacy Act

A. Write-in candidates' names will not appear on tile official elections ballot, but instead on a separate supplement available at polling stations.

B. Any write-in candidate who applies after the forty-eight (48) hour deadline will not appear on the official write-in ballot. These candidates still reserve the right to have their names written in on the official elections ballot by persons wishing to vote for said candidate.

Section 3 Campaigning Act

A. Student Government election campaign signs may not be fastened to painted surfaces of buildings, nailed to trees, or painted to sidewalks or buildings.

B. All campaign signs must be made of materials which are easily removed, and all campaign material is to be removed no later than one week after the election.

C. During the course of the election, no campaign materials are to be present on the same floor as the polling areas while the polls are open. The only exception to this will be hand bills which

might be carried in by the students. These hand bills may not be given out or placed on the same floor, but may be in the personal possession of students. No campaign materials will be placed on official university vehicles.

D. Any type of campaign activity is prohibited within fifty feet of polling areas which are in operation. Poll workers are strictly prohibited from trying to sway the vote of any student in any way while they are working or present at the polls.

E. No one may remove or deface a campaign poster.

F. Any person violating the campaign regulations will be subject to disciplinary action. A candidate in violation of these regulations may be subject to having his/her candidacy invalidated, or removal from office. A new election may be called for if violations are such that this is necessary. If a violation is committed by a campaign worker under the direction of his or her candidate, that candidate will be responsible for the violation.

Section 4 Funding Act

A. All of the candidates for each executive office (President, Vice President, and Secretary-Treasurer) shall be eligible for campaign financing from the S.G.A. campaign finance

fund, not to exceed $50.

B. All of the candidates for Senator shall be eligible for campaign financing from the S.G.A. campaign finance fund, not to exceed $25.

C. Funding for the S.G.A. campaign fund shall be secured or reserved from 606 Funds. Expenditures for the perspective campaigns shall be in a manner as prescribed by S.G.A. law and regulations as followed by the Vice President for Student Affairs office For the disbursement of 606 funds.

D. Each candidate who accepts campaign funding shall file a report of his/her expenditures of campaign finance money to the Secretary of Interior no later than 4 p.m. five days after the S.G.A. election. Any candidate failing to file this form shall be fined no more than $25, or subject to disciplinary action by the University Judicial Committee, or both.

E. No candidate shall be made to follow the already established laws and regulations concerning 606 funding pertaining to organizations. Rather, this act shall supersede 606 laws for organizations and expenditures for candidates from the 606 fund shall be in accordance with this act.

F. In the event there is a surplus of money that is not used in the S.G.A. campaign, it will be returned to the 606 fund.

ARTICLE 2 ELECTION PROCESS

Section 1 Ballot Act

A. General election ballot shall be of uniform size and color.

B. The candidates for President shall appear on the general election ballot, followed by those for Vice-President, Secretary-Treasurer, and the student Senate in that order.

C. The order of the names of candidates for Student Government offices shall appear in random order to be determined by the Secretary of Interior while supervised by one representative from the three branches of Student Government. These representatives shall be selected by the Student Government President.

Section 2 Ballot Box Security

A. Each polling place for the general elections shall be provided with a locked ballot box, in which voters shall deposit their marked ballots.

B. The Secretary of Interior shall see that each ballot box shall be emptied and locked no later than the time specified by the Secretary of the Interior on the day prior to the first day of the general elections, and the slot will be sealed. This seal shall not be broken until the opening time for the polling place on the first day of the general elections. When a polling place closes on the first day, the poll official shall reseal the slot and the ballot box shall be deposited in a secure holding area. This second seal shall not be broken until the opening time for the polling place on the second day of the general elections. When the polling place closes on the second day, the poll official shall again reseal the slot. All sealing and seal-breaking of ballot box slots shall be done in the presence of at least one witness.

Section 3 Election Tally and Certification Act

A. After the close of the polls on the second day of the general elections, the ballot boxes shall be taken to a central tally station, where the ballots shall be counted.

B. Each candidate shall be allowed one representative excluding the candidate himself/herself or another candidate at the central tally station for the purpose of observing the procedure.

C. Vote totals shall be released to the public through written and orally certified statements by the Secretary of the Interior and the Vice President for Student Affairs.

D. No one shall be allowed to leave or enter the central tally station after the tallying process has commenced, except for the Secretary of Interior and those granted exemption for cause by the Vice President for Student Affairs.

E. In the case where, within one slate of candidates, the selection cannot be ascertained, the slate shall be marked "CANCELED" and shall not enter the tally, but the remaining slates shall not be rendered invalid. In the event that the number of selections made within a slate of candidates exceeds the number of offices to be elected from that slate, then that slate shall likewise be marked "CANCELLED" and shall not enter the tally.

F. The Secretary of Interior shall inspect the final tally sheets and compute the total count for each candidate. These shall constitute the election results and shall be certified in writing by the Secretary of Interior. These results shall be official and final.

G. The Secretary of Interior shall submit a copy of the certified election results to the Secretary of Legislative affairs within eight (8) hours after the close of the polls. The Secretary of

Legislative Affairs shall maintain a permanent record of the official election results.

H. Every candidate shall have the privilege of contesting of ballots. In such cases, the ballots shall be recounted in the presence of the interested parties. All of which shall be conducted by the proper officials and supervised by the Secretary of Interior.

I. The privilege of contest shall be limited to a period often days after the election results have been certified.

Section 4 Elections Commission Act

A. A committee shall be formed which shall assist in the official administration of the S.G.A. general elections.

B. The elections committee shall be chaired by the Secretary of Interior. In the event of his/her absence, the Secretary/Treasurer of the S.G.A. shall preside over any meetings. The committee will be composed of the following members:

1. Secretary of Interior

2. Secretary/Treasurer of the S.G.A.

3. Secretary of Public Relations

4. Two senators not seeking reelection, and

5. Two other students as selected by the Secretary of Interior

C. This committee shall meet at times prescribed by the Secretary of Interior, not to be less than once a month, in order to discuss the S.G.A. problems arising from their administration.

ARTICLE 3 VOTING PROCESS

Section 1 Voting Act

A. All voting in the general election shall be by private ballot. Each voter shall be insured the right to private ballot.

B. Each student at East Tennessee State University has the right to vote for the maximum number of candidates in any college.

C. No student shall be denied that right if they are registered students at East Tennessee State University.

D. The poll officials shall verify the eligibility of each person seeking to vote by looking at the potential voter's East Tennessee State University identification card. If, on the rear of this card, the sticker received upon payment

of fees from the Comptroller's Office is attached and current, the student shall be allowed to vote.

E. A student shall be allowed to vote only once during the general elections.

F. All registered students at East Tennessee State University shall be eligible to vote, as provided for in Article I, Section 2, of the Student Government Constitution.

APPENDIX G

MACK "SCOTTEE" SCOTT'S PETITION TO ENTER THE BALLOT FOR STUDENT SENATE

[Fold-out]

NAME: Mack "Scottee" Scott } Insure that it reads this way on the ballot!

I.D. NUMBER: 424-74-2310

CAMPUS BOX: 22077 — As the encumbered with top billing!

PHONE (optional): 423 392 4214

- HOURS EARNED: ~~57~~ 53
- DATES OF ATTENDANCE AT ETSU: AUG 1993 - present
- QPA: 2.921 2.54
- COLLEGE TO REPRESENT: ETSU/UT at Kingsport
- DECLARED MAJOR (S): ENTC / ~~AFAM~~ MGT.

TITLE V, SECTION 104:

To constitute a valid filing of a petition to enter the ballot, the candidate shall be responsible for supplying required on the petition form. All petitions found to be incomplete, falsified, or incorrect shall be void. The Secretary of Interior shall be designated representative for the purpose of verifying any information listed on a petition to enter the ballot. This section (Section 104) shall be included on the petition form just above the portion where the candidate must affix his/her signature.

Mark "Scottee" Scott 3/4/96
CANDIDATE'S SIGNATURE DATE

- These shall be certified by the office of Student Affairs of their designated representative.

[illegible] 3/4/96
SIGNATURE OF CERTIFYING OFFICIAL DATE

SJ
EX.#7

BEST AVAILABLE COPY

PETITION FOR NOMINATION OF CANDIDATE FOR STUDENT GOVERNMENT ASSOCIATION POSITION

We the undersigned qualified voters of the Student Body do hereby nominate Mack "Scatter" Scott for the office of Senator of the Student Body (SGA) to be voted on in the general election held on April 2 & 3, 1996. We request that his/her name be placed on the official ballot to be used in the said election.

STUDENTS SIGNATURES & I.D. NUMBERS:

1. [illegible] 33-[illegible]
2. [illegible]
3. John Pace 415-17-4927
4. Kamel G. Kam 023-30-7374
5. Anita Smith 341-76-7664
6. Bill Cruikshank 573-86-5367
7. [illegible] 415-62-5515
8. [illegible] 421-64-6768
9. [illegible] 350-29-1721
10. [illegible] 413-21-[illegible]
11. Erika Smith 413-61-9374
12. Mark Fuchs 545-41-1465
13. [illegible] 378-02-2773
14. [illegible] 458-51-4734
15. [illegible] 251-60-5632
16. [illegible] 414-[illegible]
17. Karen Hixson 513-76-5039
18. [illegible] 25[illegible]
19. [illegible] 254-67-3464
20. [illegible] 5[illegible]
21. [illegible] 410-32-7[illegible]
22. [illegible] 45-45-5631
23. [illegible] 256-39-1841
24. [illegible] 415-[illegible]
25. [illegible] 469-35-0[illegible]
26. [illegible] 414-[illegible]37
27. [illegible] STARR [illegible]
28. [illegible]
29. [illegible] 514-75-4173
30. [illegible]
31. [illegible] 413-[illegible]
32. [illegible] 413 55[illegible]
33. [illegible]
34. [illegible] 415-[illegible]
35. [illegible] 411-53-[illegible]
36. [illegible] 233-12-2709
37. [illegible] 224-41-9052
38. [illegible] 410-55-[illegible]
39. [illegible] 415-61-4787
40. [illegible] 512-37-[illegible]
41. [illegible] 17-8-[illegible]
42. [illegible] 413-57-3056
43. [illegible] 223-47-7700
44. [illegible] 413-33-[illegible]
45. [illegible] 414-45-9192
46. [illegible] 403-15-1408
47. [illegible] 224-25-[illegible]
48. [illegible] 411-04-7710
49. [illegible] 409-57-[illegible]
50. [illegible] 211-13-[illegible]
51. [illegible] 415-59-[illegible]
52. [illegible] 413-[illegible]
53. [illegible] 575-12-6450
54. [illegible] 413-31-3663
55. [illegible] 225-22-[illegible]
56. [illegible] 574-15-[illegible]
57. [illegible] 225-35-[illegible]
58. [illegible] 413-47-[illegible]
59. [illegible] 225-17-9553
60. [illegible] 221-[illegible]
61. [illegible] 413-47-[illegible]
62. [illegible] 413-[illegible]
63. [illegible] 413-41-[illegible]
64. BRIAN STONE 413-17-6836
65. Kathryn Kupersmith 206-45-1013.
66. William Bl[illegible] 412-45-3230
67. [illegible] 413-[illegible]
68. [illegible] 413-[illegible]
69. [illegible] 223-88-4463
70. [illegible] 41[illegible]

71. [illegible] 410-54-7996
72. [illegible] 413-53-9289
73. [illegible] 410-54-[illegible]
74. [illegible] 051 58 2468
75. [illegible] 216 04 4114
76. [illegible] 414-51-[illegible]
77. [illegible] 415-56-7841
78. [illegible] 413-7-7-5453
79. [illegible] 411 53 1229
80. [illegible] 413-[illegible]-0048
81. Matt B. Scott 413-53-0757
82. [illegible] 413 [illegible]
83. [illegible] 363-78-6285
84. [illegible] 242-27-5515
85. [illegible] 225-29-4012
86. [illegible] 284-43-2560
87. [illegible] 410-51-4644
88. [illegible] 414-76-0899
89. [illegible] 409-41-[illegible]
90. [illegible] 414-51-5176
91. [illegible] 414-57-[illegible]
92. [illegible] 419-55-4873
93. [illegible] 228-27-5209
94. [illegible] 227-04-1219
95. [illegible] 469-51-3155
96. [illegible] 169 34 0359
97. [illegible] 411 45 6407
98. [illegible]
99. [illegible] 206-57-7559
100. [illegible]
101. [illegible] 411 35 5562
102. [illegible] 457-17-6043
103. [illegible]
104. [illegible] 411-41-0962
105. [illegible] 411-03-6195
106. [illegible]
107. [illegible]
108. [illegible] 251-35-5340
109. [illegible] 412-47-2420
110. [illegible] 415-69-7750
111. [illegible] 229-78-9629
112. [illegible] 419-55-5144
113.
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APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENVILLE

[Filed August 16, 1998]

No. 2:96-CV-412

MACK EDWARD SCOTT, *Plaintiff*,	)
v.	)
DORMAN STOUT, LAURIE PRICE, TONIA MARTIN, and EAST TENNESSEE STATE UNIVERSITY, *Defendants*.	)

Judge Hull

COMPLAINT

Plaintiff files this complaint for damages and equitable relief for acts of racial discrimination perpetrated against him by the defendants and avers:

1. Plaintiff's claim for damages and equitable relief as a victim of intentional racial discrimination and retaliation,

denial of substantive due process and equal protection of the laws, and denial of freedom of speech and association is premised upon Title VI of the 1964 Civil. Rights Act, as amended, codified at 42 U.S.C. § 2000d et seq., upon the provisions of 42 U.S.C. § 1985, upon the provisions of 42 U.S.C. § 1981, and upon the First and Fourteenth Amendments to the U.S. Constitution. Plaintiff avers he is also entitled to bring portions of this action pursuant the provisions of 42 U.S.C. § 1983. This Court has jurisdiction of the plaintiff's claims under these federal statutes and the provisions of 28 U.S.C. § 1331.

2. Plaintiff Mack E. Scott is a Black American and is a resident of Sullivan County, Tennessee. The plaintiff is forty-one (41) years of age and an armed services veteran who has determined to complete his education under the GI Bill and has, at all times pertinent to his complaint, been enrolled as an undergraduate student at East Tennessee State University. Plaintiff is a direct and intended beneficiary of federal funds in the form of federal Pell Grant payments made on this behalf and for his benefit to East Tennessee State University to pay for the cost of tuition and student activities. The University is the recipient of these federal payments for purposes of Title VI jurisdiction.

3. Defendant East Tennessee State University is one of Tennessee's major state institutions of higher learning with its main campus located in Johnson City, Washington County, Tennessee, and with a satellite campus located in Kingsport, Hawkins County, Tennessee. Defendant University, hereinafter referred to as ETSU, is the recipient of federal funds for the use and benefit of its various educational and administrative programs and University student activities and

is thus subject to the racial discrimination prohibitions of Title VI of the 1964 Civil Rights Act. Defendant also receives federal funds through various students, including the plaintiff, in the form of federal Pell Grants which pay for tuition and student activities for each student/grantee. The defense of Eleventh Amendment immunity for ETSU has been removed by Congress for purposes of Title VI of the Civil Rights Act of 1964 by the Civil Rights Remedies Equalization Amendment, 42 U.S.C. §20000d-7(a)(2). Service on defendant ETSU is being accomplished by certified mail upon the Tennessee Attorney General. The individual defendants are being served at their respective residences or places of business.

4. Defendant Dorman Stout is a resident of Johnson City, Tennessee. Defendant Stout is the University Vice-President of Student Affairs and is the faculty advisor to the University's Student Government Association. As such, defendant Stout is involved in, participates in, and approves the decisions of the Student Government Association, including those which discriminated against retaliated against the plaintiff because of his race, association, and speech, and which deprived him of due process and equal protection of the laws. Defendant Stout is being sued for damages in his individual or personal capacity and not in his official capacity.

5. Defendant Laurie Price is a resident of the Commonwealth of Virginia and is a faculty advisor to the Student Service Board at the Kingsport University Center Campus. She maintains an office at the University Center in Kingsport, Hawkins County, Tennessee. As alleged herein, defendant Price violated defendant's First and Fourteenth Amendment rights and civil rights while acting under color of

law and in her personal capacity. Defendant Price is being sued for damages in her individual or personal capacity and not in her official capacity.

6. Defendant Tonia Martin is a student at East Tennessee State University and has been the president of the Student Government Association (SGA), a student organization officially sponsored, counseled, and approved by the University. She is a resident of Washington County, Tennessee, at 2810 Plymouth Road, #1, Johnson City, TN 47601. Defendant Martin, in conspiring with the other individual defendants as alleged herein to deprive the plaintiff of his Fourteenth Amendment equal protection and due process rights and in discriminating and retaliating against him because of his race, was acting under color of law and in her individual capacity. Defendant Martin is being sued for damages in her individual or personal capacity and not in her official capacity as President of the SGA, a position created and recognized by the rules and regulations of defendant University.

7. All of the individual defendants are white and are subject to the racial, conspiracy prohibitions set out at 42 U.S.C. §1985(3). All individual defendants acted under color of law and in their personal/individual capacities in violating University and SGA rules and regulations to deprive the plaintiff of his First and Fourteenth Amendment rights and in discriminating against him because of his race and his exercising his right of free speech and in depriving him of his right to be a candidate for the SGA Senate. Defendants are individually liable in damages to the plaintiff under the provisions of 42 U.S.C. §1983, and §1985. All of the individual defendant's conduct and actions described herein

were intentional and deliberate and were motivated by a desire to deprive the plaintiff of his SGA Senate seat and of the opportunity to run for said office because of his race and because he had exercised his right of free speech and association and had criticized and sued the University for previous acts of race discrimination. Although the published policies and regulations of the University prohibit the type of constitutional and civil rights violations committed by the defendants in their individual capacities, the University took no official action to correct or remedy the violations of its policies and regulations and the racial discrimination perpetrated against the plaintiff after he complained of the violations and discrimination through official University channels. ETSU's failure to remedy and redress the race discrimination, and the constitutional deprivations the plaintiff suffered as a result of the racial animus, constitutes independent grounds for the University's liability for damages under Title VI of the 1964 Civil Rights Act.

8. Plaintiff Scott enrolled as a student at ETSU in August, 1993. The plaintiff, because of his age and experience in the military, is extremely interested in community affairs, in student government, and in higher learning. While enrolled as a student at defendant University, plaintiff ran for, and was elected to, the office of Senator in the University Student Government Association. Plaintiff also became active in the local student government organization at the ETSU/UT Kingsport Center, known as the Student Advisory Council. During the spring semester of 1994, the Kingsport campus Student Advisory Council, with the encouragement, condonation, and involvement of Joseph Tinnon, the Kingsport campus director, discriminated against the plaintiff because of his race and his efforts to exercise his

First Amendment rights and effectively prevented him from campaigning for the position of Advisory Council President so that a white student could retain that position in violation of the University and Council's rules and by-laws as they existed prior to Director Tinnon's discriminatorily modifying and amending them. Plaintiff subsequently filed a federal court action against the University and Joseph Tinnon for violation of his Title VI and civil rights in Case No, 2:95-CV-135. That case is still pending. In this action the plaintiff seeks relief from subsequent acts of discrimination which have been perpetrated by different individual defendants in their personal/individual capacities and which have deprived him of his Senatorial seat in the University's Student Government Association (SGA), which sits at the University's main campus in Johnson City, Tennessee, and of his right to be a candidate for the SGA under the University and SGA's rules, by-laws, and regulations.

9. In retaliation for his having objected to the discriminatory manner in which he had been treated when he attempted to run for the office of president of the Kingsport campus Student Advisory Council, defendant Tonia Martin the president of the University's Student Government Association (SGA), with the encouragement of defendant's employees Price and Stout, conspired with the each other and with others to have the SGA legislative body amend the Charter, by-laws and other regulations of the SGA in order to prevent the plaintiff from continuing to hold his 1995 SGA office because he did not at the time take courses at the Kingsport Center. The discriminatory political machinations failed to produce any legislative changes in the SGA's charter, and by-laws. However, defendants continued to harbor animosity towards the plaintiff because of his race and

because of his outspokenness regarding race discrimination and the University's retaliating against him for his having complained to University officials regarding the 1994 acts of discrimination against him. After the defendants' failed discriminatory efforts, the plaintiff continued in his term as SGA Senator.

10. On March 4, 1996, plaintiff filed a qualifying petition for his candidacy for another elected term as Senator on the University SGA. The Student Government Association is a university organization recognized and sponsored by East Tennessee State University, with University approved by-laws and regulations, and is the governing body for the students and student affairs at the University. The SGA is aided, assisted, and counseled by University faculty and staff, including defendant Stout. Plaintiff's petition was scrutinized by the appropriate SGA committee and officers, including defendant Martin. The adequacy and legality of the plaintiff's petition and his candidacy was confirmed by SGA officers, including defendant Martin, at public meeting of the SGA on March 5, 1996.

11. On or about March 6, 1996, plaintiff embarked on a University-sponsored African study tour with one faculty member and four other University students. His trip to the African continent was part of a history independent study worth three credit hours in the history curriculum at the University. Plaintiff was absent from the University campus in Johnson City, Tennessee for two weeks. When he returned to the ETSU campus, Plaintiff discovered that in his absence, and without his knowledge, his name had been removed from the SGA ballot. Plaintiff had not received any notice that his name was going to be stricken from the ballot and had

assumed, while he was on the study tour in West Africa, that he would be able to campaign for his Student Government Association Senate seat when he returned to the campus.

12. Plaintiff was the only black student who qualified for the 1996 SGA election. Nineteen other white students qualified for the senate SGA positions, Defendant Dorman Stout, the University vice-president of student affairs and faculty advisor to the SGA, left a recorded message on the plaintiff's answering machine in which he advised the plaintiff that a committee of students had been formed during the plaintiff's absence to "review" some of the qualifying petitions. Plaintiff's petition was "recommended" for this *ad hoc* review by defendants Stout, Price, and Martin. The review committee was composed of white students appointed by defendants Stout and Martin with the encouragement and advice of defendant Price. The "review" committee, after hearing the discriminatory and retaliatory representations of defendants Stout and Martin, recommended to defendants Martin and Stout that the plaintiff's petition be rejected and that his name not be included on the official ballot. Defendant's Stout and Martin "accepted" this recommendation which they had unlawfully engineered and did not place the plaintiff's name on the final official SGA ballot. The reason advanced by defendant Stout for having the plaintiff's name removed from the ballot was that the plaintiff was not currently taking classes at the Kingsport University Center in the Spring of 1996.

13. Plaintiff was extremely offended that his name had been removed from the SGA ballot. Plaintiff had followed all of the rules and regulations of the University and of the Student Government Association with regard to his submitting

his qualifying petition. Plaintiff submitted his petition it in the same fashion as he had in previous years when he had been a successful candidate, and assumed during his absence, that the same University and SGA rules and regulations would continue in effect so that he could campaign for and be reelected for his senate seat in April 1996. The SGA elections were held on April 2-3. Since plaintiff's name had not been placed on the ballot he was not elected and lost his SGA seat.

14. Under the SGA charter and by-laws, plaintiff and other student candidates had always been voted upon at large by all University students. It had never been a requirement that a student candidate be enrolled in any particular college or at any particular location in order to run for SGA office. However, the plaintiff had attended the Kingsport University Center in the recent past semesters and would do so again in the future.

15. Plaintiff avers that the University catalogue provisions, SGA charter, by-law, and rules and regulations as they existed at the time his qualifying petition was filed and approved on March 5, 1996 constitute a contract between him and the University which cannot be breached or altered because of racial bias and animus by the individual defendants or by the University under the provisions of Title VI. Plaintiff avers that the individual defendants are therefore liable for their respective unlawful actions which breached said contract because of racial bias under the terms of 42 U.S.C. § 1981.

16. Plaintiff avers that the University catalogue provisions prohibiting race discrimination against individual students, and the SGA charter, by-laws, and rules and regulations which governed the rights of all students to qualify

for, and campaign for SGA Senate seats, and which were approved and implemented by the University, created liberty and property interests under state law which are protected from impairment by the provisions of the Fourteenth Amendment and 42 U.S.C. § 1983. Under said rules and regulations, the plaintiff had a liberty and property right to be, and legitimate expectation of being, a candidate for the SGA Senate and was deprived of his right and expectation while he was absent from the country by the unlawful conspiracy and actions of the defendant because of the plaintiff's race. In discriminating against the defendant because of his race and his prior complaints of racial discrimination and retaliation, the defendants violated the University's published policies against race discrimination and violated the published official rules and regulations which governed the SGA affairs and elections. The University, for purposes of Title VI liability, sanctioned and approved the racially discriminatory conspiracy and actions of the individual defendants which violated its published policies and federal law. The individual defendants violated plaintiff's substantive and procedural due process rights when they, under color of law, ignored the existing University and SGA regulations and discriminatorily removed the plaintiff's name from the SGA ballot.

17. Plaintiff objected, to the retaliatory and discriminatory actions of the University (and the SGA, as part of the University) and of the individual defendants as alleged above. He complained through established channels in the Student Government Association as well as to the University's Affirmative Action Officer and the University's Director of Multi-Cultural Affairs. As a result of never receiving any response from University's Affirmative Action Officer, the

Plaintiff appealed the racially discriminatory and retaliatory rejection of his candidacy through the SGA Student Court and was rebuffed. The Student Court ignored the applicable federal law and published SGA regulations in order to sanction the discrimination of its president, defendant Martin and the other individual defendants. Illustrative of the hollowness of the defendant's pretextual reasons for preventing the plaintiff from running for the SGA Senate is the Student Court's recommendation that the Student Government Association legislatively amend its by-laws to sanction the type of action the defendants took against the defendant. In spite of his official duty to intervene and rectify the discrimination and constitutional violations, defendant Stout personally encouraged and supported the deprivation of plaintiff's constitutional rights and racial discrimination, The plaintiff continued to complain and appeal to higher authorities at the university including Dr. Bader, Associate Vice-President of Student Affairs, and Dr. Roy Nicks, University President and CEO. None of the University's managing agents who had authority to rectify the discriminatory and unlawful rejection of plaintiff's qualifying petition and his subsequent exclusion from SGA office because of his race took any corrective action. The University turned a deaf ear and a blind eye to the race discrimination, retaliation, and constitutional violations perpetrated against the plaintiff.

18. Plaintiff avers that the defendants Price, Stout, and Martin conspired and collaborated in the secretive and unlawful appointing and convening of a student "review committee" in his absence from the University campus in order to "legitimate" the removal of his name from the Student Government Association ballot. Plaintiff is informed

and does believe that defendants Stout and Martin discriminatorily recommended a "review" of his qualifying petition and discussed his candidacy with the *ad hoc* committee in order to secure the recommendation of the committee that his petition be "rejected" and his name be removed from the SGA ballot. Rather than offer or suggest any alternative which would have allowed the plaintiff to remain a candidate and rather than make any effort to contact the plaintiff in person, defendant Stout simply left a message of the plaintiff's telephone answering machine while he was out of the country on a University-sponsored study tour

19. Plaintiff's avers that the defendants' concerted collaboration and subsequent discriminatory actions in furtherance of their conspiracy constitute a violation the provisions of 42 U.S.C. §1985(3) since the conspiracy and subsequent actions were motivated by racial bias and retaliation and were intended to, and did, deprive the plaintiff of his SGA Senate seat and his First and Fourteenth Amendment rights.

14. Plaintiff avers that the individual defendants, either participated in and approved, or condoned and ratified the above described violation of University rules, regulations, and catalogue provisions and the Student Government Association by-laws and regulations, the First and Fourteenth Amendment to the U.S. Constitution, and Title VI to the 1994 Civil Rights Act, and the provisions of 42 U.S.C. §1981 and 42 U.S.C. §1985(3). Defendants Stout, Price, and Martin conspired, set in motion, and actively participated in the scheme to deprive the plaintiff of his civil and constitutional rights and have his name removed from the SGA ballot. The University, which through its executive and administrative officials had the

ultimate authority to remedy and redress the violation of the plaintiff's civil and constitutional rights, has turned a deaf ear to the plaintiff's appeals and entreaties, and has thereby condoned, ratified, and approved the racially-motivated conspiratorial and unlawful conduct of defendants Price, Stout, and Martin.

15. Plaintiff avers that each defendant is individually liable in damages, for his/her respective unlawful conduct which was committed under color of law and in contravention of their respective official responsibilities to comply with the University rules and regulations and applicable federal law. Plaintiff avers that in conspiring, participating in, condoning, and/or ratifying the race discrimination, retaliation, and unconstitutional deprivations of liberty and property interests inflicted upon the him, defendants Stout, Price, and Martin acted intentionally and with reckless and callous disregard for the plaintiff's federally protected civil rights. Plaintiff avers that the defendants are therefor individually liable for punitive damages. Plaintiff avers that reasonable individuals who hold positions of responsibility at a public university similar to those held by the individual defendants in this would know that the U.S. Constitution and federal civil rights law prohibit black student's being denied the opportunity to qualify for or hold a student government association office because of his race, because of his speech, because he had complained of prior acts of discrimination, or because he had previously sued the university for race discrimination under Title VI. Reasonable individuals holding similar offices to the plaintiff should also know that anti-discrimination provisions of a university catalogue and the by-laws Student Government Association cannot be violated in order to prevent an otherwise qualified black student candidate from running for

an elected SGA Office. Plaintiff avers that the plethora of integration and race discrimination cases involving public education institutions and voting rights had clearly established by 1994, 1995, and 1996 that a black student cannot be denied an equal opportunity to participate in university student government activities because of his race or his exercising his First Amendment rights.

16. Plaintiff has been embarrassed, frustrated, and humiliated because of the defendant's individual and collective unlawful conduct. He has been discriminated against as an individual and as a University student because of his race and because he exercised his First Amendment rights. He has lost the opportunity to be an SGA Senator for 1996-1997 and to exercise the his First Amendment rights as a SGA Senator.

17. Plaintiff avers that in addition to damages from the individual defendants he is entitled to equitable relief in the nature of an order reinstating him to a Senatorial seat in the SGA.